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## THE DECLARATORY JUDGMENT—A NEEDED PROCEDURAL REFORM

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It is now our purpose to undertake an analysis of numerous declaratory actions and judgments, with a view to determine the scope of and the limitations upon this useful form of procedure. An examination of declaratory judgments in the various jurisdictions in which the institution has been adopted reveals a remarkable similarity of fundamental principles characterizing the practice of making judicial declarations. As our interest is confined to the practice, emphasis will be laid not upon the decision itself as a matter of substantive law, but rather upon the type of question submitted for declaratory judgment, the cases in which such judgments are rendered, and the limitations placed by the courts upon the exercise of the power to make declarations of rights and of other jural relations.

#### COMBINATION OF ACTIONS

It has already been noted that under the practice in England it is usual to combine with the request for a declaration a request for an injunction or for damages where coercive relief is obtainable and desired. Under the Act of 1852, this was the only kind of case in which a declaration could be made, although the plaintiff was not required to ask for coercive relief. Under the rules of 1883, however, the limitation that coercive relief must be obtainable has been removed, so that declaratory actions may now be instituted in which no injunction or damages could be obtained.

Yet there is a decided advantage in combining the request for coercive relief, when desired, with a request for a declaration. It may easily happen, for example, that the injunction requested is not granted on the merits; and in our American practice the bill would then be dismissed with costs, for the denial of the injunction leaves no alternative. In the English and Scotch practice, however, the additional request for a declaration does leave an alternative, and it is constantly employed by the courts. By declaring what are the jural relations of the parties, the necessity for further litigation is usually obviated and all the purposes of coercive relief will have been served. For example, the P. & O. Steamship Co. brought an action for a declaration and injunction against a dock company to have declared illegal and to enjoin the enforcement of certain regulations and charges in respect to certain docks which the steamship company might at some time need. The steamship company during the trial evidently decided to abandon the prayer for the injunction but the proceedings continued and the court made a declaration, as requested, that the regulations were illegal; and this declaration served all the purposes of the steamship company.<sup>137</sup> So the court may, in the exercise of its equitable discretion, refuse an injunction where it believes the interests of justice do not require it, and grant a requested declaration in its stead. Thus, in a case where the sewer of a municipal corporation emptied into that of another under an agreement held *ultra vires*, the court considered the great inconvenience of suddenly closing a sewer in daily use and refused the injunction, but declared the plaintiff's right to relief with leave to apply for an injunction after a reasonable time, should the defendants fail to make other arrangements.<sup>138</sup> In another case, while declaring a certain act a trespass, the court refused to enjoin it as too trivial for an injunction.<sup>139</sup> The request for a declaration may also be used, alone or with a prayer for further relief, in a counterclaim.

The practice mentioned above of requesting a declaration as an alternative remedy is explained by the fact that if not claimed, it will not as a rule be granted. There is, therefore, much to gain and nothing to lose by asking it. In one important case, an exception to the general rule, a declaration was made although not requested.<sup>140</sup> In this case a mining company had by its negligence caused the water in a canal to become polluted and to subside to such an extent that an

<sup>137</sup> *London Assn. of Shipowners etc. v. London & India Docks etc.* (C. A.) [1892] 3 Ch. 242. See also *Atty. Gen. v. Merthyr Tydfil Union* (C. A.) [1900] 1 Ch. 516.

<sup>138</sup> *Islington Vestry v. Hornsey U. C.* (C. A.) [1900] 1 Ch. 695. See also *Grainger v. Order of Canadian Home Circles* (1914) 31 Ont. L. Rep. 461.

<sup>139</sup> *Llandudno U. D. C. v. Woods* [1899] 2 Ch. 705.

<sup>140</sup> *Evans v. Manchester, Sheffield & Lincolnshire R. R.* (1887) 36 Ch. D. 626.

adjoining mill-owner was damaged by the escape of water into his mill. Inasmuch as certain remedial procedure had been provided for by statute, the court refused an injunction but put its finding in the form of a declaration of the defendant's liability for the damage caused, both present and future. Nor will a court, as a rule, make a declaration different from the one requested. The declaratory judgment is not an equitable remedy<sup>141</sup> which the courts can adjust or grant conditionally according to the "equities"—to the justice of the case.<sup>142</sup> Unless put in the form of a general question on originating summons for the court's determination, it is either categorically granted or refused. A complaint, therefore, frequently contains a request for several declarations, some of which may be granted and others refused. The Indian courts, while putting these rules into practice,<sup>143</sup> have claimed the privilege of altering a declaration requested to suit the circumstances.<sup>144</sup>

It will be recalled that under the Indian Specific Relief Act, 1877, a declaration cannot be granted in a case in which the plaintiff could have requested further relief by way of injunction,<sup>145</sup> damages, or claim to recover possession of property.<sup>146</sup> This resembles the practice of the German Supreme Court and is of interest as representing the antithesis of the former English practice under the Act of 1852, this being the only kind of case in which a declaration *could* be made.

While the German practice now admits in principle the possibility of combining the declaratory with the executory action, the fact is that this is done only when by the declaratory action a distinct end is to be achieved; for example, in cases of continuing injury, the plaintiff may seek damages for the injury that has occurred and a declaration of liability for the injury that may occur in the future;<sup>147</sup> or a plaintiff may sue for a declaration of the defendant's liability (technically, duty), although the injury is complete, if he is unable at the moment accurately to estimate his damages.<sup>148</sup> Yet it is the rule that when the executory action is feasible, a plaintiff will not be

<sup>141</sup> See Farwell, L. J., in *Chapman v. Michaelson* (C. A.) [1909] 1 Ch. 238, 243.

<sup>142</sup> A possible exception may be found in the case of *Honour v. Equitable Life Ass. Soc.* [1900] 1 Ch. 852, in which the declaration was refused on the defendants undertaking not to avail themselves of a certain defense, although it is not at all clear that the court made this a condition.

<sup>143</sup> *Nobin v. Nilkamal* (1916) 25 CALCUTTA L. J. 537, 545; *Hemendra v. Upendra* (1915) 43 I. L. R., Calcutta, 743, 766.

<sup>144</sup> *Abhoy v. Kelly* (1880) 5 I. L. R., Calcutta, 949.

<sup>145</sup> *Nauji v. Umatul* (1912) 15 CALCUTTA L. J. 724. See also *supra*, p. 29.

<sup>146</sup> *Jibunti v. Shibnath* (1883) 8 I. L. R., Calcutta, 819.

<sup>147</sup> (1889) 23 R G, 346, 348; (1898) 41 R G, 369, 372.

<sup>148</sup> Gaupp-Stein, *op. cit.* 613, n. 100. Indeed, in such cases the declaratory action *must* be brought if the plaintiff wishes to stop the running of the statute of limitations. (1913) 83 R G, 358.

allowed to combine it with a declaratory action, nor indeed does he in practice sue for a declaration at all. In such cases, the courts have said that the plaintiff had no "legal interest" in the declaration. Certain exceptions to this rule have been made in the case of the administration of estates or where a defendant has avowed his willingness to abide by and carry out a declaratory judgment. But such cases are exceptional, and the necessity for exception diminishes in view of the valuable procedure for obtaining an executory judgment to cover obligations accruing in the future provided by sections 257-259 of the German code of civil procedure enacted in 1898. This action for future performance (*künftige Leistung*) is possible when the plaintiff's claim is based on an executed contract or transaction in which the plaintiff, but not the defendant, has fully performed. It covers actions:

1. For money loaned due at a future date;
2. For the surrender of a leasehold estate or of a chattel at the termination of the lease or term of hiring;
3. For installments of payments [or other acts] falling due at periodic times in the future, provided judgment has been obtained on an installment already past due;
4. Where the debtor without justification or claim of right shows that he intends to evade or refuse performance when due.<sup>149</sup>

The judgment obtained in such cases may be executed when the obligation falls due. These are declaratory judgments only in the sense that they cannot be executed when rendered, for they are executable without further proceedings on the arrival of the due day. Case 4 differs from the pure declaratory judgment not only in this respect, but because it requires an unjustified or malicious repudiation; if founded upon a claim of "right," only a declaratory judgment without executory force would be obtainable. Our action for anticipatory breach would probably cover most of the cases under division 4. Prior to 1898, the obligation being not yet due and therefore no executory action being possible, such actions had to be directed toward a declaratory judgment.

The German practice then seems to be that when an executory action would give a complete remedy, the declaratory action cannot be brought.<sup>150</sup> But this, as we have seen, is confined to those cases where the declaration is necessarily involved in the executory judgment, and pursues no independent end. Thus, in a suit for a declaration that a contract for the sale of land in Southwest Africa was void because of non-compliance with formal requirements, combined with a demand for the return of the purchase price, it was held that

<sup>149</sup> Hellwig, *op. cit.* sec. 103 a, pp. 267-269. Petersen, *op. cit.* 506-507.

<sup>150</sup> (1905) 61 R G, 242, 244.

under the circumstances the demand for the declaration was independent and not necessarily involved in the demand for restitution of the money and could be maintained.<sup>151</sup>

A declaratory action may during the course of the proceedings merge into an executory action, either by the complete accrual of the title to such an action or by the proceeding of the defendant. Indeed, the code specifically admits an amendment in the form of the action; or rather, more accurately, an amendment in the prayer for judgment.<sup>152</sup> In a recent interesting case, the plaintiff put on the market a patented washing powder. The defendant in using it sustained severe injury to her eyes, and threatened plaintiff with suit. The plaintiff thereupon brought a negative form of declaratory action to establish her non-liability (technically, non-duty to pay, *i. e.*, privilege) for defendant's injuries. During the pendency of this declaratory action, defendant sued for damages. The court held that the executory action for damages merged the claim for a declaration, and while the "legal interest" in the declaration was present when the action was instituted, it was not present at the time of judgment, when it was necessary.<sup>153</sup>

#### PURPOSE

The purpose of the declaratory action is the security desired by the plaintiff against the uncertainty of his rights and other jural relations due to their being questioned by the defendant or to the assertion of conflicting claims, or merely to the existence of records ostensibly to the advantage of the defendant which of themselves place in uncertainty the plaintiff's legal position. There need be no threat to violate the plaintiff's rights, etc.;<sup>154</sup> the mere proof of those operative facts which either of themselves, or in the hands of the defendant, endanger the security of the plaintiff's rights, etc., suffices. It is for the court to determine whether the dispute, danger or uncertainty was of such a nature, either by reason of its source or its extent, as to justify the making of the declaration asked. Some danger to the plaintiff's rights, etc., must exist, and as may be inferred, the danger or threat of attack must move either from the defendant or from records within

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<sup>151</sup> (1910) 73 R. G. 272.

<sup>152</sup> (1909) 71 R. G. 72. So defenses may be changed: (1909) 72 R. G. 143.

<sup>153</sup> (1909) 71 R. G. 68. It is sufficient, if present at the time of judgment, even if not present when the action was initiated. Warneier, *Rechtsprechung des Reichsgerichts* (1909) p. 295, no. 325. But see *Hoffman v. McCloy* (1917) 38 Ont. L. Rep. 446, 450, to the effect that it must be present when the action is instituted.

<sup>154</sup> See *Hopkinson v. Mortimer, Harley & Co. Ltd.* [1917] 1 Ch. 646. But the right, privilege, etc., must be in some danger of attack. *Toronto Ry. Co. v. City of Toronto* (1906) 13 Ont. L. Rep. 532.

his control or by which he is ostensibly benefited. Mention has been made of Justice Bailhache's remark that the declaratory judgment is not intended merely to enable persons to "sleep o' nights," and it has been said on more than one occasion that the courts will not confirm by declaration a title which is perfectly clear and not yet attacked.<sup>155</sup> In other words, it is not the function of the declaratory judgment to establish truisms that no one disputes.

As a measure of preventive justice, the declaratory judgment probably has its greatest efficacy. It is designed to enable parties to ascertain and establish their legal relations, so as to conduct themselves accordingly, and thus to avoid the necessity of future litigation.

It is further designed to enable trustees, executors, receivers and others who act in a fiduciary capacity and whose proper execution of such trusts is a matter of public as well as private interest, to obtain authoritative advice and guidance in the performance of their duties.<sup>156</sup> Recently in England, the Controller of Enemy Property under the Trading with the Enemy Acts, 1914-1916, has been authorized to ask the court for advice as to how he is to deal with creditors of the concerns under his control, how to distribute the assets in liquidation, and what his duties are in particular cases.<sup>157</sup> Somewhat related to this function of courts is the duty occasionally created by statute of answering stated questions for the benefit of administrative officers.<sup>158</sup> The

<sup>155</sup> *Earl of Galloway v. Garlies* (1838) 16 S. 1212; *Magistrates of Edinburgh v. Warrender* (1863) 1 M. 887. *Earl of Dysart v. Hammerton* [1914] 1 Ch. 822; (H. L.) [1916] 1 A. C. 57.

<sup>156</sup> For trustees in England, see Trustee Act, 1893, secs. 25, 35, 38, and Order LV, rule 3, of the Supreme Court Rules; *In re Moxon* [1916] 2 Ch. 595; *Re Hollins* (1917, Ch.) 118 L. T. 16; *In re Forster* (1917, N. S. W.) 17 St. Rep. 42. Executors, *In re Saillard* [1917] 2 Ch. 140; Receivers, *In re New Chinese Antimony Co. Ltd.* [1916] 2 Ch. 115; *Williams v. Dominion Trust Co.* (1916) 23 Br. Col. 461. Whenever persons are officers of the court, like receivers, they may in all jurisdictions ask for directions. The direction given is not merely advisory, but a binding judgment.

<sup>157</sup> *In re W. Hagelberg Akt. G.* [1916] 2 Ch. 503; *In re Fr. Meyers Sohn, Ltd.* (C. A.) [1918] 1 Ch. 169; *In re Dieckmann* [1918] 1 Ch. 331; *Re Francke and Rasch* (1918, Ch.) 118 L. T. 211.

<sup>158</sup> Thus, the registrar of titles in New South Wales can ask the Supreme Court for an opinion under sec. 23 of the Real Property Act of 1900, no. 25, as to which of two persons is entitled to priority of registration. See *In re Broughton* (1917, N. S. W.) 17 St. Rep. 29; *The Minister of Lands v. Yates* (1917, N. S. W.) *ibid.* 114. See also, section 113 of the Alberta Land Titles Act. In Scotland, municipal authorities have asked a declaration of their jurisdiction under a crown charter. *Magistrates of Edinburgh v. Officers of State* (1825) 4 S. 319. Judge Cardozo of the New York Court of Appeals in *Self-Insurer's Association and N. Y. Central R. R. Co. v. State Industrial Commission*, decided May 28, 1918 (119 N. E. 1027), considered this a non-judicial duty which the Legislature has no power to impose on the courts. He held that the Legislature by providing that the State Industrial Commission might certify to the Appellate

opinions given by the Court of Claims for the benefit of executive officers and of the supreme courts in some seven of our states for the benefit of the legislature or governor on "important questions of law" or of "constitutional law"<sup>159</sup> bear some resemblance to declaratory judgments, but embody the important qualification that they are merely advisory in their nature and are in no sense binding judgments.

The purpose for which a declaration is desired is one of the considerations entering into the exercise of the court's discretion in rendering a declaratory judgment. The equitable nature of the relief<sup>160</sup> is evident in the fact that the court may inquire into the purpose for which the declaration is asked, and must be convinced that its judgment will serve a practical end in quieting or stabilizing uncertain or disputed jural relations either as to present obligations or prospectively.<sup>161</sup> Thus, if the purpose of the action is merely to get a court's opinion on a hypothetical question which is not disputed or which requires no determination in order to settle uncertain relations or conflicting claims, no declaration will be made.<sup>162</sup> The German Supreme

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Division "questions of law involved in its decisions," intended only such questions as were involved in an actual controversy with adverse parties litigant, not questions which the commission might formulate with a view of being enlightened with respect to its powers. This limits the declaration to the determination of questions of law certified to appellate courts by inferior tribunals, a very common practice. In the recent case of *Dreiser v. John Lane Co.* (1918, N. Y. App. Div.) 171 N. Y. Sup. 605, the Appellate Division reaffirmed the court's incompetence to render advisory opinions to private parties, particularly on a question of fact.

<sup>159</sup> Such a provision is to be found in the constitutions of Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado and South Dakota; also in statutes of Canada and its provinces. See an exhaustive study on advisory opinions by Albert R. Ellingwood of Colorado College, published recently (New York, 1918) under the title *Departmental Coöperation in State Government*; and Thayer, *Legal Essays* (Boston, 1908) 42 *et seq.*, Hall, *Cases on Constitutional Law* (St. Paul, 1913) 44-45 and authorities cited in Judge Cardozo's opinion, *supra* note 158.

<sup>160</sup> Although Farwell, L. J., in *Chapman v. Michaelson*, (C. A.) [1909] 1 Ch. 238, 243 denied that it was strictly "equitable relief."

<sup>161</sup> So the Ontario Supreme Court refused to declare a licensing ordinance invalid, because before the time came for the issue of another set of licenses, a new ordinance might have been passed. *Bourgon v. Township of Cumberland* (1910) 22 Ont. L. Rep. 256. So no declaration was made on a question of the construction of a deed where, whichever way it was decided, it would necessarily not help to put an end to the litigation. *Lewis v. Green* [1905] 2 Ch. 340. The declaration was refused in *Earl of Dysart v. Hammerton* (1914) 30 T. L. R. 379, because its effect would have been nugatory. A party is "not entitled to an opinion on a speculative or academic question": *Société Maritime v. Venus Steam Shipping Co. Ltd.* (1904) 9 Com. Cas. 289.

<sup>162</sup> *Hampton v. Holman* (1877) 5 Ch. D. 183; *Magistrates of Edinburgh v. Warrender* (1863, Scot.) 1 M. 887. Declaration not made where it would have no practical utility, as the jurisdiction in such cases was vested in another

Court has expressed this idea by saying that the courts were not intended for the legal instruction of parties on abstract or doubtful questions of law or on general legal principles in which the parties had no present practical interest for the adjustment of their relations.<sup>163</sup> But this limitation has been carried quite far, so that declarations have been denied even when the parties had a certain interest in questions concerning the validity of an ordinance, the existence of a custom, the scope and intent of an administrative rule concerning particular kinds of business, the principles according to which an account should be balanced, etc.<sup>164</sup> In other words, the declaration in Germany is confined to a very concrete point, and should it require the determination of a broad question, e. g., the validity of an ordinance, the declaration may be declined on the ground that the party had not a sufficient "legal interest." Indeed, it is somewhat difficult to systematize the cases in which a declaratory judgment may be obtained in Germany, because of the fact that in many cases in which declarations are denied in the exercise of the court's discretion, the ground alleged is that the party had no "legal interest" in the declaration, although his practical interest is obvious.

One well-recognized purpose of the declaratory action in Germany is to stop the running of the statute of limitations, and indeed in certain cases where the action for damages could not be brought because of lack of information to establish the damage, the preliminary declaratory action to establish the liability has been held essential to interrupt the running of the statute.<sup>165</sup>

In England, declaratory judgments have been rendered for the information of a foreign court on a question of English law or where the party with the approval of the court intends to use the judgment in another proceeding.<sup>166</sup>

Inasmuch as the declaratory judgment is designed to settle legal relations that are disputed or endangered by the defendant's manifest

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court: *Barraclough v. Brown* [1897] A. C. 615, 623. See also *Faber v. Gosworth U. C.* (1903, Ch.) 88 L. T. 549, where declaration was declined, inasmuch as nothing had been done under certain building plans and it was impossible to tell what the consequences of the declaration asked might be.

<sup>163</sup> (1900) JURISTISCHE WOCHENSCHRIFT, 70 (R G, Dec. 15, 1899).

<sup>164</sup> (1910) 73 R G. 82, 87; Hellwig, *op. cit.* 281.

<sup>165</sup> (1913) 83 R G, 358 and the cases cited in that opinion. The court stated that this is frequently necessary in tort cases where the damages cannot be established for some years. See also (1905) 61 R G, 164, 169.

<sup>166</sup> *Hope v. Hope* (1854) 4 De G. M. & G. 328; *The Manar* (1903) 89 L. T. 218; *Guaranty Trust Co. v. Hannay* (C. A.) [1915] 2 K. B. 536. The German courts also recognize this purpose as a justification: Hellwig, *op. cit.* 285, note c. But in one case where the declaration was asked in order to use it as a foundation of a suit for damages it was refused, because it would not have enabled plaintiff to recover if he had it. *Earl of Dysart v. Hammerton* (1914) 30 T. L. R. 379; see also *Cornish v. Boles* (1914) 31 Ont. L. Rep. 524.



ability to threaten them, the declaration will not be made by consent.<sup>167</sup> This is expressly provided for in the Ontario Marriage Act, by which the court may under certain circumstances declare marriages void. The French have a well-established procedure of consent judgments based on simulated litigation, called *jugements d'expédient*, which are designed to give judicial authentication to an agreement of the parties.<sup>168</sup>

It is proper here to advert to the fact that while the declaration of one certain jural relation may be sought, its purpose may be more far-reaching. Thus, a negative declaration to establish that certain persons were not members of a certain club was really intended to establish their freedom from the duty of paying the debts of the club, which had become insolvent (*i. e.*, a declaration of privilege).<sup>169</sup> So a declaration of the defendant's no-right to walk over land in the plaintiff's possession, *i. e.*, no easement, may be designed to establish the totality of jural relations involved in ownership, just as the old action of ejectment was really an action to try title, not merely possession.

#### DECLARATION DISCRETIONARY

It has already been noted that the making of a judicial declaration in a declaratory action is discretionary with the court. Of that there is little doubt. Chitty, J., in *Austen v. Collins*<sup>170</sup> expressed the following much-quoted *dictum*:

"The rule leaves it to the discretion of the Court to pronounce a declaratory judgment when necessary, and it is a power which must be exercised with great care and jealousy."

That formula has traveled to the ends of the world, to Australia, to India, to Ontario, to British Columbia, and to the State of Connecticut;<sup>171</sup> and like most formulas, which are frequently used to avoid the necessity of thought and analysis, it has enabled courts to refuse a declaratory judgment when they could not justify their action on some better ground. While admitting the principle of discretion, it is our purpose to determine to what extent the exercise of that discretion has been hardened into rule.

It has already been noted that a declaratory judgment will not be rendered unless the courts believe that it will serve some present practical purpose.

<sup>167</sup> *Williams v. Powell* (1894) W. N. 141.

<sup>168</sup> Glasson, *op. cit.* 511, traces this proceeding back to an ordinance of Charles VIII of 1425. It is analogous to the Roman *jure in cessio* proceeding.

<sup>169</sup> (1882) 8 R. G. 3.

<sup>170</sup> (1886) 54 L. T. 903.

<sup>171</sup> See *Ackerman v. Union & New Haven Trust Co.* (1917) 91 Conn. 500, 507.

It is a universal rule that a court will not render a declaratory judgment where it has no jurisdiction of the case, either by reason of subject-matter,<sup>172</sup> or because jurisdiction has been expressly confided by statute to some special tribunal;<sup>173</sup> or the court may refuse to exercise jurisdiction because the law has provided another remedy.<sup>174</sup> Frequently the court has reached the conclusion that, while it might have exercised its power to make a declaration, it would be more expedient to try the action in some other form. This applies particularly to those cases in which the court is asked to declare the invalidity of a tax law or of an assessment under such law, in which cases the courts have held that the claimant could adequately try the question in a defense against enforcement proceedings.<sup>175</sup> A similar conclusion is often reached in the case of negative declaratory actions in which the plaintiff wishes to anticipate his legal defense by moving as actor to have the court declare the invalidity of a written instrument, *e. g.*, an insurance policy, on some alleged ground of defense which renders it void. Here the courts have frequently said: "Wait until you are sued and then raise your defense."<sup>176</sup> But where the declaration or a

<sup>172</sup> Declaration sought in England that plaintiffs were lawfully in occupation of land in South Africa, as incidental to suit for injunction and damages. Held, that the court was without jurisdiction: *British South Africa Co. v. Companhia de Mocambique* (H. L.) [1893] A. C. 602. Suit brought after expiration of statute of limitations: *Bishambhar v. Nadiar* (1914) 18 CALCUTTA L. J. 671.

<sup>173</sup> *Barraclough v. Brown* [1897] A. C. 615, 623; *Grand Junction Waterworks Co. v. Hampton U. D. C.* [1898] 2 Ch. 331; *Bull v. Atty. Gen. of N. S. Wales* [1916] A. C. 564. Exemption from military service, *Flint v. Atty. Gen.* [1918] 1 Ch. 216; Scotland: *Balfour v. Malcolm* (1842) 1 Bell, 153; *Leith Police Commissioners v. Campbell* (1866) 5 M. 247; *N. Y. & Ottawa Ry. Co. v. Township of Cornwall* (1913) 29 Ont. L. Rep. 522 (statute gave to Board of Assessment jurisdiction over petition for exemption of certain property from taxation); *Mutrie v. Alexander* (1911) 23 Ont. L. Rep. 396, 401. But see *Evans v. Manchester, etc., R. R.* (1887) 36 Ch. D. 626.

<sup>174</sup> Invalidity of a patent triable by petition for revocation. *N. E. Marine Engineering Co. v. Leeds Forge Co.* [1906] 1 Ch. 324; Scotland: *Green v. Shepherd* (1866) 4 M. 1028. See also *Baring Bros. v. Wright* (1824) 2 S. 609; *Williams v. Jackson* (1904) 11 Br. Col. 133; *In re Estate of Katarain Kahutia v. Finn* (1900, N. Z.) 19 S. C. 112. See also (Oct. 18, 1880, R G) in *Bähr, op. cit.* 143. In Australia, the court has declined to render a declaratory decree in a case where it would have been unable to make it effective by further coercive relief: *Bruce v. Commonwealth Trademark Label Assn.* (1907) 4 C. L. R. 156. But see *Lautour v. Atty. Gen.* (1865, C. A.) 5 N. R. 102, 231.

<sup>175</sup> *Toronto Ry. Co. v. City of Toronto* (1906) 13 Ont. L. Rep. 532; *Ottawa Y. M. C. A. v. Ottawa* (1913, Ont. App. Div.) 29 Ont. L. Rep. 574; *Atty. Gen. for Queensland ex rel. Goldsbrough et al. v. Atty. Gen. for the Commonwealth* (1915, Australia) 20 C. L. R. 148. This is much like a petition for an extraordinary legal remedy, which will not be granted where there is an adequate remedy in a regular action.

<sup>176</sup> *Brooking v. Maudslay, Son & Field* (1888) 38 Ch. D. 636; *Honour v.*

regular action is optional, the courts now usually give the plaintiff his choice. The attitude has changed from one of extreme conservatism in the issue of a declaration to one of enlightened recognition of its value, and, if the cases of the last few years are any criterion, obstacles to its issue are now, where feasible, avoided rather than sought.

#### DECLARATIONS OF FACT

The general principle which appears to have been adopted is that the courts will not make declarations of a fact, but only of a jural relation. Exceptions to this rule have been infrequent; yet it is difficult to conceive why the rule should impair very seriously the institution of declaratory actions, inasmuch as it would seem feasible to convert the request for the declaration of an operative fact into a request for the declaration of a jural relation. Thus in Germany, where the courts are exceedingly technical in this matter, a plaintiff who wished to establish that he was not the father of a certain child sought a declaration that he had not physically cohabited with its mother during the period of gestation. The declaration was denied, on the ground that he sought the declaration of a fact and not of a legal relation.<sup>177</sup> Had he sought to establish that he was not the child's father, the action would probably have been allowed, although it would have turned on the establishment of the fact alleged. So other declaratory actions of this kind have been dismissed in Germany where they were directed to establish a man's religion, capacity to earn a living,<sup>178</sup> the condition or quality of an article,<sup>179</sup> a trade custom,<sup>180</sup> or the actual boundaries of a sales district.<sup>181</sup> In all these cases the German Supreme Court put its denial of a declaration on the ground that the code only authorized the declaration of legal relations, not of facts, with the one exception of the establishment of the genuine or fraudulent character of a legal instrument.

The English courts adopt the same view. In the above cases it would have been possible to have these facts determined, provided they were operative facts producing a particular jural relation, by placing in issue the jural relation instead of the operative fact alone. This is done constantly in the English courts in the making of declaratory judgments, and the declarations requested frequently embody a syllo-

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*Equitable Life Ass. Soc.* [1900] 1 Ch. 852, 854, and *supra*, note 133 for American cases.

<sup>177</sup> (Oct. 18, 1880, R G) Bähr, *Entscheidungen*, 143.

<sup>178</sup> (1895) JURISTISCHE WOCHENSCHRIFT, 60, no. 3.

<sup>179</sup> *Ibid.* (1889) 364, no. 1.

<sup>180</sup> (1887) 18 R G, 166, 172. See also Petersen, *op. cit.* 498.

<sup>181</sup> (1902) 50 R G, 399. See also (1914) 85 R G, 440, 442 (whether defendant had converted a certain typewriter).

gistic form leading up from operative facts to legal conclusions. So while the English courts often determine facts as incidental to legal results, they will not undertake to determine facts apart from their legal consequences. Thus, in the construction of a will and the validity of a power of appointment thereunder, it became necessary to determine the domicile of the testatrix, and whether her will was executed in accordance with the *lex domicilii* and purported to execute the power.<sup>182</sup> So Eve, J., in *Chapman v. Michaelson*,<sup>183</sup> in establishing the invalidity of a certain mortgage, had to determine that the mortgagee entered into the mortgage as a money-lender and that he was not in fact registered.

The Scotch courts appear to be more liberal in the declaration of facts, although they also have said on occasion that an action to have a fact declared without any consequential "right" or "relief"<sup>184</sup> was incompetent. Yet they have held an action competent where the plaintiff sought merely a declaration that his lands were outside the boundaries of a district in which he had been taxed upon them<sup>185</sup> or that a plaintiff was at a certain date of sound mind.<sup>186</sup>

A case recently decided by the Appellate Division in New York<sup>187</sup> indicates the need of legislation empowering the courts to declare facts, and when necessary, with the aid of a jury. The plaintiff's book "The Genius" was withdrawn from sale by his publisher, the defendant, because the defendant had been threatened with prosecution by the Society for the Suppression of Vice on the ground that the book was obscene. Its circulation, if obscene, was a punishable offense. If not obscene, as the plaintiff insisted, the defendant's withdrawal of the book was a violation of his publisher's contract with the plaintiff. The parties agreed to submit the question of violation of contract to the court on an agreed statement of facts, the only matter in issue

<sup>182</sup> *In re Wilkinson's Estate* [1917] 1 Ch. 620; see also *In re Price* [1900] 1 Ch. 442, 447.

<sup>183</sup> [1908] 2 Ch. 619. As to whether a certain road constituted a way of necessity so as to pass by implied grant, *Nicholls v. Nicholls* (1899, Ch.) 81 L. T. 81. In India, a declaration was made that certain fixtures were erected before a certain date. *Azeesa v. Calcutta* (1916) 24 CALCUTTA L. J. 562.

<sup>184</sup> *Gifford v. Trail* (1829) 7 S. 854 (that certain petitioners have a vote as freeholders, which they decided under the circumstances was not a legal question); *Lyle v. Bow* (1830) 9 S. 22 (declarator, to remedy a defect in the record of another case, that a certain person was merely a trustee).

<sup>185</sup> *Hope v. Edinburgh Corporation* (1897) 5 S. L. T. 195.

<sup>186</sup> *Mackintosh v. Smith & Lowe* (1864) 2 M. 389, though they refused later to allow this declaration, made *ex parte*, to constitute the foundation of an action for damages for false imprisonment against the keepers of an asylum. In New Zealand, a declaration was made that a power of attorney executed in Louisiana had been duly verified. *Dillon v. The Australian Mutual Provident Society* (1901, N. Z.) 20 S. C. 188.

<sup>187</sup> *Dreiser v. John Lane Co.* (1918, N. Y. App. Div.) 171 N. Y. Sup. 605.

being whether the book was obscene. It was held that as this was a question of fact it was not a proper question for judicial determination on voluntary submission. The only method then left to the plaintiff to have this issue determined would have been to sue for damages for loss of royalty—which would not have been easy to prove—and thus enable a jury to find whether the book was obscene. It would be simpler and would avoid this compulsory show of legal hostilities if the code were amended to enable the courts on submitted controversies to declare facts, with the aid of a jury, if necessary or requested by one of the parties.

On the whole it may be said that there is a great indisposition to declare facts except as incidental to their legal consequences, and in Germany no request for the mere declaration of a fact is at any time granted.

#### FUTURE INTERESTS

It frequently becomes desirable to obtain a judicial decision upon a state of circumstances which has not yet arisen. This is particularly the case with reference to the rights of reversioners and remaindermen, but it is also true of other persons who anticipate the enjoyment of rights, etc., in the future and who wish in advance of the event to know their prospective legal position. Indeed, it is probably no exaggeration to say that the majority of declaratory actions are brought in order to enable the claimants to know how they shall conduct themselves in the future. A great many cases have been decided in which this problem has been involved, and while the decisions are not altogether reconcilable, some distinctions may be found in them which will repay analysis and examination.

First, as to reversioners and remaindermen. The common-law aversion to the determination of any questions which did not require immediate solution and relief at the hands of the court was not overcome by the provisions of the Act of 1850, which gave the court power on a stated case to express its opinion on questions of the construction of wills, deeds and other written instruments, but vested it with discretion to refuse an opinion if it considered it advisable; or by the Act of 1852, which enabled it to render declaratory judgments where consequential relief might have been granted but was not claimed. The narrow construction that the declaration could be made only where the court could have given positive relief was sufficient to exclude reversioners and remaindermen from having their interests determined, for what coercive relief could the court grant them during the life of the preceding estate *in esse*? These were not actions to prevent the life-tenant from committing waste, but merely to determine what the rights, privileges, powers or immunities of the reversioner or remaindermen were. In view of this conceived necessity of being able to give coercive relief, it is not surprising that the courts

before 1883 at least, and not always after that, rejected practically all requests for declarations merely as to interests the full enjoyment of which lay in the future. Nor does any serious distinction appear to have been made between vested and contingent remainders. An important case in which this view was expressed was that of *Lady Langdale v. Briggs*,<sup>188</sup> decided in 1856, in which the court refused during the continuance of a life-estate to determine how far various ulterior limitations of leaseholds and copyholds given in trust in a will were affected by a certain codicil. It would have been possible to make the decision, but the limitations placed upon the declaration in one or two previous decisions, together with the view expressed that if the court could make a declaration of "rights" to arise in the future it would render the bill to perpetuate testimony practically useless,<sup>189</sup> served to induce the court to deny the declaration. That decision deserves mention because the colonial courts—notably those of India—were guided by it in reaching the same conclusions. In two previous cases<sup>190</sup> the Vice-Chancellor had refused to make a declaratory decree in the lifetime of the tenant for life, with regard to the interests of persons who might be entitled in reversion. Apparently, the fact that the reversioners through death might not come into the reversion was deemed of moment in deciding against the declaration, notwithstanding the fact that there was a present interest in the reversion. So in another leading case, *Bright v. Tyndall*,<sup>191</sup> the question was as to the rights under a will of the daughters still unborn of certain persons, if the daughters should live to be twenty-one and become married before that time. In an exhaustive opinion, Vice-Chancellor Malins decided that in view of the fact that many of the persons whom his opinion might affect were still unborn and that the operative facts on which his decision was asked might never arise, he would refuse the declaration. Yet there have been cases—particularly where the parties to be affected were *in esse* and the remainders were vested—in which the court has, in the exercise of its discretion, concluded that the circumstances warranted it in making a declaration of future interests.<sup>192</sup>

<sup>188</sup> (1856) 8 De G. M. & G. 391, 424.

<sup>189</sup> See also *Yool v. Ewing* [1904] Ir. Ch. 434, 445.

<sup>190</sup> *Greenwood v. Sutherland* (1853) 10 Hare, App. XIII; *Garlick v. Lawson* (1853) *ibid.*, XV. In the first case, under a will, one of the questions was:

"What children, grandchildren or other remote issue of the sons and daughters are included in the word 'issue' and what interest do such issue respectively take; and at what ages are such interests vested and payable." Wood, V. C., refused a declaration except with regard to the legatees before the court.

<sup>191</sup> (1876) 4 Ch. D. 189, 194. So where a declaratory decree affected only infants it was not made: *Webb v. Byng* (1856) 8 De G. M. & G. 633.

<sup>192</sup> That a remainderman was entitled to property absolutely, on the death of a life-tenant, the limitation over not being void for remoteness. *Bell v. Cade* (1861) 2 J. & H. 122; see also *Fletcher v. Rogers* (1853) 10 Hare, App. XIII

The more modern rule, which in recent cases has been approved, was enunciated in 1882 by Jessel, M. R., in *Curtis v. Sheffield*.<sup>183</sup> He remarked:

"Now it is true that it is not the practice of the Court, and was not the practice of the Court of Chancery, to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decision, or there are some other special circumstances to satisfy the Court that it is desirable at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs, and it becomes a bare technicality. The reason of the rule is this, that the Court will not decide on future rights, because until the event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties who, when the event happens, may be entitled to succeed."

Yet the old tradition is strong, and notwithstanding the fact that Order XXV, rule 5, has cleared away the limitation that the court must have been able to give consequential relief, and Order LIV, A, gives a wide power of interpreting wills and other written instruments, the tendency to revert to the former restrictions frequently reappears.<sup>184</sup> On the whole, we may say that when the remainder is vested and not contingent, when the parties to be affected by the judgment are *in esse*, of age, and represented before the court, the general rule is to make the declaration.<sup>185</sup>

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(the interests of children who might be alive at the death of their respective parents); *Dowling v. Dowling* (1866) L. R. 1 Ch. 612 (that certain sons took an absolute interest, to be divested in the case of a particular son if he died without issue). Such declarations as to "future interests" had occasionally been made even before 1852 when incidental to the determination of present rights, although the practice appears to have been somewhat irregular. See *Curtis v. Sheffield* (1882, C. A.) 31 Ch. D. 1, 4. For the German practice see (1885) 13 R G, 386, 388; (1887) 21 R G, 409, 411.

<sup>183</sup> (1882, C. A.) 31 Ch. D. 1, 3, 4. This rule was approved in *In re Staples* [1916] 1 Ch. 322, where the plaintiffs were devisees in remainder, representing all of their class, who were all over age, who wished to know whether they had estates in tail in remainder as tenants in common, and if not, what classes would on the death of the life-tenant be entitled. The court declined to make the declarations while the devisees were remaindermen. In *In re Freme's Contract* (C. A.) [1905] 2 Ch. 778, the court saw no reason why they should refuse a declaration which might affect unborn children, they being in the same case with certain other children who were represented before the court. An excellent criticism of the English decisions before 1892 is contained in an article *The Declaration of Future Rights*, by W. A. Bewes (1892) 8 L. Quart. R., 48-55.

<sup>184</sup> See *Yool v. Ewing* [1904] Ir. Ch. 434, 444.

<sup>185</sup> See *West v. Lord Sackville* (C. A.) [1903] 2 Ch. 378, *per* Stirling, L. J.; *In re Freme's Contract* (C. A.) [1905] 2 Ch. 778.

The Scotch courts, which have always been less conservative than those of England in determining future interests, have recently laid considerable emphasis on the criterion of whether the interest was vested or not.<sup>196</sup> Yet, while they have not hesitated to decide on contingent future interests if there was some one in existence to dispute them,<sup>197</sup> they have not been willing to declare the power of certain persons to give property by will when their decision might profess to determine the rights of children yet unborn who would not be bound by the decision, and when there was a possibility of contingencies arising which might render it nugatory.<sup>198</sup> Indeed, *dicta* are to be found in the Scotch reports to the effect that the process of declarator is not intended to declare "remote and contingent rights."<sup>199</sup>

The Indian courts before and since the enactment of the Specific Relief Act in 1877 have rendered decisions which are utterly irreconcilable.<sup>200</sup> The more modern rule appears to permit those having vested future interests to bring a declaratory action to determine their rights, etc.<sup>201</sup> So, many cases are to be found in which reversioners bring declaratory suits to have it determined that various acts of the life-tenant, *e. g.*, alienation, adoption, and mortgage, are void as to the plaintiff.<sup>202</sup>

In two interesting cases, a husband whose right depended on his surviving his wife,<sup>203</sup> and a woman whose object was to obtain a declaration that she was entitled to an inchoate right of dower in certain lands,<sup>204</sup> were denied declarations,—although in the latter case it was admitted that her interest was a present one,—on the ground that the enjoyment of these interests depended on a contingency. If rendered now, the judgments would not commend themselves as well reasoned.

Apart from the interests of reversioners and remaindermen under the peculiar common-law rules governing real property, a great many

<sup>196</sup> *Millar v. Millar's Trustees* (1896) 4 S. L. T. 122.

<sup>197</sup> *Mackenzie v. Lady Mary Hanbury* (1846) 8 D. 964. See also *Provan v. Provan* (1840) 2 D. 298, a disputed question of vesting in the future.

<sup>198</sup> *Harvey v. Harvey's Trustees* (1860) 22 D. 1310, 1326.

<sup>199</sup> *Mag. of Edinburgh v. Warrender* (1863) 1 M. 887.

<sup>200</sup> A brief survey of the declaratory judgments on the rights of reversioners may be found in 2 Woodman, *Digest of Indian Law Cases*, col. 2142 *et seq.*

<sup>201</sup> See *Thakurain v. Thakurain* (1881, P. C.) L. R. 9 Indian App. 41.

<sup>202</sup> *Isri v. Mussumut* (1883, P. C.) L. R. 10 Indian App. 150. See among the official illustrations to section 42 of the Specific Relief Act, illustration (d), (e) and (f).

<sup>203</sup> *Kewan v. Crawford* (1877) 6 Ch. D. 29, 42, explainable in that it was decided before 1883, when Order XXV was promulgated.

<sup>204</sup> *Bunnell v. Gordon* (1890) 20 Ont. L. Rep. 281, a reversion to the old tradition.



actions are brought by persons who wish the court to declare by anticipation what their future rights or duties, powers or liabilities may be. This function of the declaratory judgment is exceedingly valuable, for it enables persons in doubt to learn authoritatively how they are to govern themselves in the future. The stability of legal relations, certainly one of the most important phases of teleological jurisprudence, is thereby greatly enhanced, and it is to be hoped that the efforts of the future will be directed to the promotion of this function of the law. To this end the declaratory judgment will be found a most effective instrument.

In England, because of the origin of the declaratory judgment in a dependency upon the power to grant consequential relief, a conservative tendency in declaring future jural relations is to be noted, not altogether overcome by the unrestricted powers conferred by Order XXV. The usual rule still is that only present jural relations will be passed upon. The extent of the increased liberality in declaring jural relations with respect to the future may best be illustrated by the decided cases. Thus, it has been held that the defendants were liable for the damage the plaintiff had sustained and might sustain in the future by reason of the subsidence of canal water and its escape into plaintiff's mill;<sup>205</sup> that the defendant and not the plaintiff is liable to bear the excess-profits tax in future payments of salary and commission;<sup>206</sup> that plaintiff had a future power of renewal of his lease, his compensation for the surrender of his leasehold interests depending on the value of this power of renewal, if he had it;<sup>207</sup> that a certain contract which still had some time to run was not binding on the plaintiffs;<sup>208</sup> that defendants as partners before the war would be entitled to profits on a certain basis after the war;<sup>209</sup> that a life-tenant under a proviso that his estate should be forfeited if he sold it might raise *ab ante* the question of his power to sell without incurring any forfeiture;<sup>210</sup> that certain authorities were entitled to inspect in the future all acts of committees submitted to a municipal council for approval;<sup>211</sup> that plaintiff had a right of access to the city hall;<sup>212</sup> that plaintiff was entitled to a percentage of certain royalties received

<sup>205</sup> *Evans v. Manchester, etc. Ry.* (1887) 36 Ch. D. 626, 640. But see *Atty. Gen. v. Scott* (1904, K. B.) 20 T. L. R. 630, 633.

<sup>206</sup> *Thompson Bros. v. Amis* [1917] 2 Ch. 211, 220.

<sup>207</sup> *Bogg v. Midland Railway* (1867) L. R. 4 Eq. 310.

<sup>208</sup> *Société Maritime v. Venus Shipping Co.* (1904) 9 Com. Cas. 289. And see the numerous cases recently decided on the effect of the war on contracts still to be performed in whole or in part, *infra*, notes 306-308.

<sup>209</sup> *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonmagenindustrie* (H. L.) [1918] A. C. 239.

<sup>210</sup> *Chaplin's Trustees v. Hoile* (1890, Scot.) 28 S. L. R. 51.

<sup>211</sup> *Williams v. Mayor of Manchester* (1897, Q. B.) 13 T. L. R. 299.

<sup>212</sup> *Journal Printing Co. v. McVeity* (1915, Ont. App. Div.) 33 Ont. L. Rep. 166.

in the future by the defendant.<sup>213</sup> In the last case (*Hoffman v. McCloy*), which arose on an appeal from an order granted on motion made over a year after the judgment for the appointment of a receiver and an accounting for royalties received since the date of the judgment, the majority of the Appellate Division of Ontario held that such royalties could only be collected by a regular action after they became due and they intimated that the original declaratory judgment should not have been made, on which point, however, there was some difference of opinion. In such cases, a conservative court could probably satisfy its conscience in that the judgment for damages for the injury already sustained is an implied declaration that the continuance of the injury would be followed by the same consequences.

In an action against an insurance company, the plaintiff sought to have a life insurance policy declared valid on which the company had repudiated liability on the ground that it had been obtained by fraud. The insured was still alive; hence no action on the policy was yet possible. The court declined the declaration on the ground that the company might be in a better position to defend the suit on the policy when the action matured than it then was. The ground does not appear convincing, inasmuch as it had repudiated liability on the ground of fraud, of which it must have had evidence.<sup>214</sup>

We have seen that the German law made the declaratory action dependent on a condition diametrically opposed to that of the English Act of 1852, namely, that there shall be no right to consequential relief, whereas in England the existence of such a right was essential. Accordingly, Germany found the declaratory judgment an exceedingly useful instrument for the declaration of jural relations to be enjoyed in the future. From the beginning, therefore, "future rights" have been declared, the only limitation being that there had to be an existing legal relation between the parties when the declaratory action was instituted. Thus, we find judgments declaring a liability for future damages;<sup>215</sup> that payments be reimbursed for any claims which may be brought against the plaintiffs;<sup>216</sup> that a landed estate is bound to furnish wood as needed to a municipality;<sup>217</sup> that defendants were bound under a contract to pay plaintiff a certain sum in case she

<sup>213</sup> *Powell & Thomas v. Evans Jones & Co.* [1905] 1 K. B. 11; *Hoffman v. McCloy* (1917, Ont. App. Div.) 38 Ont. L. Rep. 446. But see *Stewart v. Henderson* (1914, Ont. App. Div.) 30 Ont. L. Rep. 447, where a declaration on an analogous claim was refused.

<sup>214</sup> *Honour v. Equitable Life Ass. Soc.* [1900] 1 Ch. 852. In similar cases the courts have hesitated to declare policies and notes void before they became due, preferring to allow the plaintiff to plead his defenses when sued on these instruments. See *supra*, note 133.

<sup>215</sup> (1885) 13 R. G. 372, 374; (1901) 49 R. G. 370, 371.

<sup>216</sup> (1905) 61 R. G. 164, 166.

<sup>217</sup> (1898) 41 R. G. 369.

married;<sup>218</sup> that a father was under a duty to furnish his daughter upon her marriage with a reasonable outfit;<sup>219</sup> that a foreign government was entitled to a legacy as soon as the royal sanction was given;<sup>220</sup> that an officer's wife was entitled to a pension when he died.<sup>221</sup> But a prospective heir cannot bring an action during the lifetime of a testator to determine the invalidity of a will, on the ground that there is as yet no sufficient "legal relation" between the parties.<sup>222</sup>

Reference has already been made<sup>223</sup> to the German law in force since 1898 by which an action may be brought under certain circumstances to recover money or enforce performance of an obligation due in the future. This is not a declaratory judgment, but a judgment which may be executed when the obligation becomes due. The advantages of this procedure under modern methods of business afford a profitable subject for study by American lawyers.

#### DECLARATION OF STATUS

The determination of questions of status was the earliest function of the declaratory judgment both in Roman law and by specific designation in the English law. The public and private interest in the security and certainty of personal status induced the early extension of judicial power to the determination of doubtful or disputed cases of status. It will be recalled that the Legitimacy Declaration Act, 1858, enabled any British subject to apply by petition to the Court for Divorce and Matrimonial Causes—the court which had taken over the jurisdiction in matters of status formerly vested in the ecclesiastical courts—for a declaration of legitimacy, or of the validity or invalidity of a marriage.<sup>224</sup> That same Act empowered any person domiciled in England, Ireland or Scotland, or having real estate in England or Scotland, to apply for a "declaration of right" to be deemed a natural-born subject.<sup>225</sup>

Under this Act various cases have arisen in which a plaintiff claimed a declaration that he was legitimate and the lawful successor to a title or to property, as a consequence of the validity of the union, as a

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<sup>218</sup> See Petersen, *op. cit.* 501, note.

<sup>219</sup> (1901) 49 R G, 370. But if she had not been engaged when she brought the action, the court would have found that she had an insufficient "legal interest." The father had refused to give her the outfit. Execution, of course, was conditional on her actual marriage.

<sup>220</sup> (1911) 75 R G, 406.

<sup>221</sup> (July 6, 1880, R G) Bähr, *op. cit.* 144. This claim was both conditional and future. The officer was still alive, and it was conditional on the wife surviving him.

<sup>222</sup> Gaupp-Stein, *op. cit.* 608.

<sup>223</sup> *Supra*, p. 108.

<sup>224</sup> 21 & 22 Vict. ch. 93, sec. 1.

<sup>225</sup> *Ibid.* sec. 2.

lawful marriage, of which he was the offspring.<sup>226</sup> But the English courts do not admit an action to have a child declared illegitimate,<sup>227</sup> as is permitted in Scotland,<sup>228</sup> even when an action is framed involving property for the purpose of establishing the illegitimacy of a child.<sup>229</sup>

The English ecclesiastical courts had long before 1857, when their jurisdiction was transferred to the Court for Divorce and Matrimonial Causes (now the Probate, Admiralty and Divorce Division of the High Court), exercised jurisdiction over suits known as "jactitation of marriage"—a term derived from the canon law—in which one person asserts or boasts that he or she is married to the other, whereby a common reputation of their marriage may result. Either of the parties to the alleged relationship—but not a third person<sup>230</sup>—may ask for a declaration that such a marriage never existed and that the boaster be enjoined to refrain from any future jactitation of the marriage.<sup>231</sup> It is analogous to an action for slander *per se*. Such actions are now rare,<sup>232</sup> as the same result is obtainable under the Legitimacy Declaration Act, authorizing actions to which third persons having property interests may be parties. It will be recalled that Order XXV, rule 5, does not apply to the Probate Division. The Scotch courts deal with such cases by the declarator of putting to silence, in which, if successful, perpetual silence is imposed on the defendant. This is but one of the varied uses of the declarator of perpetual silence. The judgment is conclusive as to the fact of marriage or not. The English law, like other systems of law, has long been familiar with the action for the annulment of marriage. When this declares void a so-called marriage which was never legally a marriage, it is a declaratory judgment. If it merely annuls a voidable marriage on the request of one of the parties, it is, like a divorce decree, investitive rather than declaratory.<sup>233</sup> The Scotch utilize the declarator of marriage and the declarator of nullity of marriage to have the validity or invalidity of a marriage declared.<sup>234</sup> The Indian courts frequently have occasion to

<sup>226</sup> *West v. Lord Sackville* [1903] 2 Ch. 378; *Beresford v. Attorney General* (C. A.) [1918] P. 33. See also *Plummer v. Plummer* [1917] P. 163, 165.

<sup>227</sup> *Yool v. Ewing* [1904] Ir. Ch. 434.

<sup>228</sup> *Gardner v. Gardner* (1877) 2 A. C. 723. There is a special declarator of bastardy in Scotland.

<sup>229</sup> *Cooke v. Cooke* (1865) 4 De G. J. & S. 704, reversing *Gurney v. Gurney* (1855) 1 H. & M. 413.

<sup>230</sup> *Campbell v. Corley* (1862) 31 L. J. Prob. 60.

<sup>231</sup> *Hawke v. Corri* (1820) 2 Consist. 284. See a brief note in (1897) 103 L. T. 381.

<sup>232</sup> *Thompson v. Rourke* [1892] P. 244 appears to be the last case, and the only one since 1862.

<sup>233</sup> *Supra*, p. 4.

<sup>234</sup> *Fraser, op. cit.* 1238, 1244.

declare the validity or invalidity of a marriage<sup>235</sup> or of an adoption.<sup>236</sup> Mention has been made of the Wisconsin statute authorizing the declaration of the validity of a marriage which has been doubted or disputed.<sup>237</sup> The Ontario Marriage Act which gave the courts of Ontario power to declare marriages valid or invalid was finally held unconstitutional in *Peppiatt v. Peppiatt*<sup>238</sup> on the ground that this was a matter solely within the jurisdiction of the Dominion Government.

The German Civil Code and Code of Civil Procedure provide expressly for the declaration of the existence or non-existence of a marriage, of the relation of parent and child, and of the paternal power of one of the parties over the other.<sup>239</sup> But as the German law provides special proceedings both for the annulment of void and of voidable marriages, the special declaratory action under sections 633 and 638 has been held to apply only to a limited class of cases, *e. g.*, when a marriage is alleged which has not been recorded: where it is doubtful whether a marriage contract or ceremony was concluded, or whether a marriage has been annulled abroad. In other words, the intrinsic grounds of nullity or voidability are not investigated in this declaratory action, but only formal matters. This holds true more or less of the questions affecting legitimacy under sections 640 *et seq.*, which cover such matters as dates of birth,<sup>240</sup> actual legitimation, or other facts which may be established by investigation. Questions involving the substantive law of legitimacy and paternal power may be tried by the regular declaratory actions.

The English courts under their power to construe wills and deeds of trust under Order LIV, A, frequently determine incidentally questions of status and relationship.<sup>241</sup> Similarly, the county judges acting as arbitrators under the Workmen's Compensation Act, 1906,

<sup>235</sup> *Aunjona v. Pralhad* (1870) 6 Bengal L. R. 243; *Mussamat v. Mussamat* (1876) 25 Suth. W. R. 444; *Yamanabai v. Narayan* (1876) 1 Indian L. Rep. Bombay, 164, 167. Declaration by a woman and her children against a third person that plaintiffs are the wife and children of A, a living person. See illustration (h) to sec. 42 of Specific Relief Act, 1877, Collett, *op. cit.* 222.

<sup>236</sup> *Kotomarti v. Kotomarti* (1874) 7 Mad. 351. The Civil Procedure Code of Ceylon, 1889, sec. 217, provides for declaratory decrees which "declare a right or status." 1 Pereira, *op. cit.* 319.

<sup>237</sup> *Supra*, p. 32.

<sup>238</sup> (1916) 36 Ont. L. Rep. 427.

<sup>239</sup> Code of Civil Procedure, secs. 633, 638, 640 *et seq.* 2 Gaupp-Stein, *op. cit.* 277 *et seq.*

<sup>240</sup> (1911) 76 R. G. 283.

<sup>241</sup> *e. g.*, whether a certain legatee under a will was a Roman Catholic: *In re May* [1917] 2 Ch. 126. Whether plaintiffs were tenants for life or had some other status under a will: *In re Boyer's Settled Estates* [1916] 2 Ch. 404. The frequent determination of who are "lawful issue" (*e.g.*, *In re Timson* [1916] 2 Ch. 362) does not usually involve the declaration of status.

determine questions of relationship to the decedent of alleged dependents.<sup>242</sup>

Among the numerous other questions involving the declaration of status or relationship which have come before the courts are the declaration of lunacy;<sup>243</sup> the judicial declaration of death;<sup>244</sup> of the plaintiff's right to be restored to his caste;<sup>245</sup> that plaintiffs are not members of a certain society;<sup>246</sup> that petitioner be declared insolvent;<sup>247</sup> that plaintiffs are tenants and not day-laborers;<sup>248</sup> that plaintiff and defendant are partners;<sup>249</sup> that defendant is a trustee for the plaintiff;<sup>250</sup> that plaintiff is heir to another.<sup>251</sup> When such judgments establish a new status or relationship, however, they are investitive rather than purely declaratory.

#### CONSTRUCTION OF WRITTEN INSTRUMENTS

One of the most fruitful uses of the declaratory judgment has been found to lie in the determination of the validity or invalidity or of the meaning of written instruments. Where a dispute turns upon the

<sup>242</sup> *Simms v. Lilleshall Coal Co.* (C. A.) [1917] 2 K. B. 368.

<sup>243</sup> Usually only incidental to a petition for the appointment of a curator or guardian. This of course is well recognized in our law where commissions are appointed upon writs in the nature of writs *de lunatico inquirendo* to determine whether the subject of the inquiry is a lunatic or not. *Burke v. Wheaton* (1828) 3 Cranch C. C. 341; *Cox v. Osage County* (1890) 103 Mo. 385, 15 S. W. 63. See also *Vuyk v. Vuyk* (1882) 1 So. Afr. Rep. 19; *In re I. M.* (1913) Queensland W. N. case 40. For a declaration of sanity, see *Mackintosh v. Smith & Lowe* (1864, Scot.) 2 M. 389.

<sup>244</sup> Likewise known in many systems of law, but not generally as an independent procedure as it is, e.g., in Germany and Ontario. German Civil Code (after ten years' absence), secs. 13-18; (1905) 60 R. G. 196, 198. In Ontario, seven years' absence under sec. 148 of the Insurance Act, *Re Marshall and Ancient Order of United Workmen* (1888) 11 O. W. R. 1078; 12 *ibid.* 153. See also Pennsylvania, Laws 1917, ch. 193, p. 460.

<sup>245</sup> (India, 1876) 7 Suth. Civ. R. 299.

<sup>246</sup> (1882) 8 R. G. 3.

<sup>247</sup> Usually incidental to some decree for appointment of receiver, etc. See Indian Code of Civil Proc. 1882, secs. 344, 351.

<sup>248</sup> (1886) 16 R. G. 390. In construing a bequest, the Chancery Division had to determine whether farm laborers were "servants": *In re Forrest* [1916] 2 Ch. 386.

<sup>249</sup> *Edmonds v. Edmonds* (1903, N. Z.) 24 S. C. R. 440.

<sup>250</sup> *Raser v. McQuade* (1904) 11 Br. Col. 161. See also *In re Charteris* [1917] Ch. 257. Such an action may be brought in the United States. See *Donohoe v. Rogers* (1914) 168 Cal. 700, 144 Pac. 958. To effect that a certain man was "bare trustee" under a statute, *In re Blandy Jenkins' Estate* [1917] 1 Ch. 46.

<sup>251</sup> This is the Scotch declarator of heirship. *Menzies v. McKenna* (1914) 51 C. L. Rep. 205. But it was not allowed where A brought declarator against B that B was not the heir of C, deceased. *Officers of State v. Alexander* (1866) M. 741; (H. L.) 6 M. 54.

construction or interpretation of a document or written instrument it is clear that amicable submission by which a court is asked to declare its effect or meaning will be as efficacious in determining the jural relations of the parties as hostile litigation. The English Act of July 15, 1850, therefore, enabled the Court of Chancery on a special question stated to determine "the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter or thing therein contained."<sup>252</sup> This power was extended by Order LIV, A, of the Supreme Court rules promulgated in 1893 to include "a declaration of the rights of the persons interested" in such "deed, will, or other written instrument," and the decision is obtainable on originating summons. The court may direct any persons interested to be served and brought in. The majority of the declaratory judgments now rendered in the Chancery Division involve the construction of wills and deeds of settlement; but numerous cases may be found which involve the interpretation of contracts, leases, mortgages and other written instruments, including even statutes and ordinances.

The power to construe wills without the issuance of any decree or order constitutes a reform of vast importance when one recalls the ruinous and prolonged litigations recorded in the law reports of the early nineteenth century, the issue tried involving merely the construction of a will, the ascertainment of the persons entitled to legacies, or the proper administration of an estate. Not only a trustee or executor, but any person interested may now ask for a declaration or determination of any question arising under the will in whose solution he is interested. A few of our states now admit bills to construe wills<sup>253</sup> at any time a disputed question arises, whether questions of trusts are involved or not. The procedure is so eminently practical and useful that it may be hoped that all of our states will soon accept this modern instrument of preventive justice.

Perhaps the best way to indicate the scope of this power of construing wills in the form of declarations is to present certain illustrative determinations to be found in recent decisions. These cases include such declarations as the following: the destination of a legacy on the death of the legatee;<sup>254</sup> whether a certain bequest constituted a residuary bequest;<sup>255</sup> the method of distribution of the residuary estate;<sup>256</sup> the power of a married woman to make "future" mortgages under a testamentary devise of a reversion providing for a

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<sup>252</sup> *Supra*, p. 7.

<sup>253</sup> *Supra*, p. 30.

<sup>254</sup> *In re Harrison* (1918, Ch.) Weekly Notes, March 30, 1918, 91.

<sup>255</sup> *In re Gliddon* [1917] 1 Ch. 174; *in re Woolley* [1918] 1 Ch. 33.

<sup>256</sup> *In re Walker* [1917] 1 Ch. 38.

restraint on anticipation;<sup>257</sup> whether death-duties were to be paid out of a specific legacy or by the corpus of the estate;<sup>258</sup> and other questions concerning the incidence of taxation; whether a will validly executed a power of appointment;<sup>259</sup> whether "lawful issue" is confined to children or includes remoter descendants;<sup>260</sup> whether plaintiffs were tenants for life<sup>261</sup> or were "servants" within the meaning of a bequest;<sup>262</sup> whether the bequest of an annuity charged on real estate with power of appointment over the annuity made it a "perpetual" charge;<sup>263</sup> whether a gift<sup>264</sup> or certain trusts<sup>265</sup> were valid or void; to whom certain income or chattels<sup>266</sup> or devises of realty<sup>267</sup> belonged; the quantity of the estate devised;<sup>268</sup> whether plaintiff, a widow, was immune from any defeasance of her title to a legacy in case she married.<sup>269</sup>

Similar questions arise under deeds of settlement and trust: *e. g.*, whether a settler's attempted assignment was or was not an imperfect voluntary gift,<sup>270</sup> or was void as against his creditors;<sup>271</sup> whether certain dividends payable in stock were to be treated as capital or as income and who was entitled thereto;<sup>272</sup> whether a certain gift was within the exception of a covenant to settle after-acquired property;<sup>273</sup> whether plaintiff had power to disentail without consent;<sup>274</sup> whether a settler was privileged to deduct the income tax from certain gifts

<sup>257</sup> *In re Chrimes* [1917] 1 Ch. 30.

<sup>258</sup> *In re Kennedy* [1917] 1 Ch. 9. See also *In re Scull* (1917, C. A.) 118 L. T. 7; *In re Palmer* [1916] 2 Ch. 391.

<sup>259</sup> *In re Wilkinson's Estate* [1917] 1 Ch. 620; *In re Mackenzie* [1917] 2 Ch. 58. See also *In re Wernher* [1918] 1 Ch. 339; *Redman v. Permanent Trustee Co.* (1917, Aus.) 22 C. L. R. 84, 17 N. S. W. 60.

<sup>260</sup> *In re Timson* (C. A.) [1916] 2 Ch. 362.

<sup>261</sup> *In re Boyer's Settled Estates* [1916] 2 Ch. 404.

<sup>262</sup> *In re Forrest* [1916] 2 Ch. 386.

<sup>263</sup> *Townsend v. Ascroft* [1917] 2 Ch. 14.

<sup>264</sup> *Atty. Gen. for New Zealand v. Brown* (P. C.) [1917] A. C. 393; *Van Kerkvoorde v. Hedley* (1917, N. S. W.) 17 St. Rep. 265. That an attempted gift over, after a bequest, was void: *In re Dugdale* (1888) 38 Ch. D. 176.

<sup>265</sup> *In re Ludwig* [1916] 2 Ch. 26; *In re Garnham* [1916] 2 Ch. 413; *In re Melody* (1917, Ch.) 118 L. T. 155.

<sup>266</sup> *In re Eyre* [1917] 1 Ch. 351; *in re Beresford-Hope* [1917] 1 Ch. 287.

<sup>267</sup> *Redman v. Permanent Trustee Co.* (1917, N. S. W.) 17 St. Rep. 60; *Falconer Stewart v. Wilkie* (1892, Scot.) 19 R. 630.

<sup>268</sup> *Fletcher v. Rogers* (1853) 10 Hare App. XIII.

<sup>269</sup> This is one of the few French cases of the negative form of declaration. *Hervé* (Paris, Apr. 1, 1862) D. 62, 2, 77.

<sup>270</sup> *Carter v. Hungerford* [1917] 1 Ch. 260.

<sup>271</sup> *In re Bulteel's Settlements* [1917] 1 Ch. 251.

<sup>272</sup> *In re Hatton* [1917] 1 Ch. 357; *In re Thomas* (C. A.) [1916] 2 Ch. 331.

<sup>273</sup> *In re Thorne* [1917] 1 Ch. 360.

<sup>274</sup> *In re Blandy Jenkins' Estate* [1917] 1 Ch. 46.



in trust;<sup>275</sup> what was the amount and character of the interest settled on certain beneficiaries,<sup>276</sup> or the privileges and immunities derived from certain marriage settlements.<sup>277</sup> Thus a receiver in bankruptcy of a *cestui's* life-estate, which a prospective purchaser declined to take on the ground that it was defeasible, obtained a declaration that he had power to convey good title to an indefeasible life-estate.<sup>278</sup>

Suits are frequently brought to have deeds or mortgages declared invalid, or valid,<sup>279</sup> when their validity is disputed. So mortgages and deeds, like other instruments, occasionally require construction, *e. g.*, whether upon the separation by deed of a single tenement into two tenements, a right of way over one passed to the grantee of the other by implication.<sup>280</sup>

In connection with bills of sale, actions have been brought to have them declared void<sup>281</sup> and to construe them.<sup>282</sup>

Leases have frequently been construed. Actions have been brought to have them declared fictitious or void as against the interests of the plaintiff.<sup>283</sup> The judicial power to construe covenants in leases *before*

<sup>275</sup> *Brooks v. Price* (C. A.) [1916] 2 Ch. 345.

<sup>276</sup> *Harvey v. Harvey's Trustees* (1860, Scot.) 22 D. 1310.

<sup>277</sup> *Mackenzie v. Lady Mary Hanbury* (1846) 8 D. 964; *Byam v. Byam* (1854) 19 Beav. 58; *Smith v. Smith's Trustees* (1905) 12 S. L. T. 782.

<sup>278</sup> *In re Burroughs-Fowler* [1916] 2 Ch. 251.

<sup>279</sup> As to deeds, there are relatively few cases in England, but many in India. Very often the declaration is merely incidental to a suit to set aside the deed declared invalid. See *Pearce v. Bulteel* [1916] 2 Ch. 544 (void against creditors). Indian cases: *Nufsa v. Mahomed* (1875) 24 W. R. 336. For a declaration that a deed is forged see *Prasanna v. Mathuranath* (1871) 8 Bengal L. R., Append. 26; 15 W. R. 487. Suit has occasionally been brought to have a deed declared valid. *Phoolchunder v. Sheoranee* (1868) 9 W. R. 104.

Validity of a mortgage, *In re Chrimes* [1917] 1 Ch. 30; *The Manar* [1903] P. 95 (where the declaration, however, was denied). Invalidity of a mortgage as against creditors, *Chapman v. Michaelson* [1908] 2 Ch. 612; (C. A.) [1909] 1 Ch. 238 (privilege of the debtor; immunity of the trustee). Invalidity of a debenture trust-deed and of debentures issued thereunder: *Pacific Coast Coal Mines, Ltd. v. Arbuthnot* (1917, P. C.) 117 L. T. 613. For cases in Germany see (1909) 71 R. G. 12 and (1910) 74 R. G. 292.

<sup>280</sup> *Nicholls v. Nicholls* (1899, Ch.) 81 L. T. 811. See also *Shaw v. Scottish Widows' Fund Life Ass. Soc.* (1917, Ch.) 117 L. T. 697.

<sup>281</sup> That the bill of sale did not truly set forth the consideration for which it was given, *Parsons v. Equitable Investment Co.* (C. A.) [1916] 2 Ch. 527. Purchaser sued for a declaration that a contract of purchase was void because of the vendor's misrepresentations: (1907) 65 R. G. 399, 403. Declaration that an execution sale of property had been illegally held: *Kripa v. Ranchanidhi* (1913) 19 CALCUTTA L. J. 388.

<sup>282</sup> Action by a vendor to have it declared that the purchaser had no-right to have inserted in the conveyance the grant of a certain right of way. *In re Walmsley and Shaw's Contract* [1917] 1 Ch. 93.

<sup>283</sup> *Raghubar v. Bhaikdhari* (1869) 3 Bengal L. R., Append. 48; *Ram v. Rughoo* (1876) 1 Indian L. Rep., Calcutta, 456.

they are broken and before damages have accrued is a good illustration of the efficacy of the declaratory judgment. For example, the following case has arisen on several occasions: Under a lease containing a covenant against assignment by the lessee without the consent of the lessor, which is not to be arbitrarily withheld, the lessee has wished to assign, but the lessor has imposed certain conditions upon the grant of his consent. In this country, the lessee might make the assignment, if the assignee was willing to take it, and thereby invite a suit on the covenant, or else he might decline to assign and forego the benefits he expected. In England he has a third alternative, exceedingly valuable, which enables him to ask the court whether the landlord's consent is unreasonably withheld or whether the landlord has the power to impose onerous conditions upon the grant of his consent. In several cases brought by lessees who desired to assign the courts made such declarations.<sup>284</sup>

In other cases declarations have been made as between lessor and lessee to determine on whom, under a covenant, fell a loss by fire from aircraft bombs;<sup>285</sup> that a certain notice of termination of lease by the lessee was ineffectual to operate as a surrender and that the lease was still subsisting;<sup>286</sup> that a receiver of a lessee had no power to deduct from the rent certain income taxes;<sup>287</sup> that a lessee was privileged and had a right to remove timber from certain leased land, without interference by the defendant lessor, owner under a land grant from the crown.<sup>288</sup>

Reference has already been made to various cases in which insurers have sought to have the court declare the invalidity of policies, either before any loss has occurred or before suit has been brought against them.<sup>289</sup> Such requests for declarations are almost always incidental to a bill for the cancellation or delivering up of the alleged invalid policy.

In a number of cases actions have been brought to determine the powers of unincorporated associations or of corporations, involving a construction of their by-laws or articles of incorporation. Thus questions have been raised for declaration whether a club whose object

<sup>284</sup> Negative declaration of defendant's (lessor's) disability to impose onerous conditions. *Young v. Ashley Gardens Properties, Ltd.* [1903] 2 Ch. 112; *Jenkins v. Price* [1907] 2 Ch. 229; *West v. Gwynne* [1911] 2 Ch. 1; *Evans v. Levy* [1910] 1 Ch. 452; *Cornish v. Boles* (1914) 31 Ont. L. Rep. 505. In some of these cases the declaration asked was of plaintiff's power to assign without lessor's consent.

<sup>285</sup> *Enlayde, Ltd. v. Roberts* [1917] 1 Ch. 109.

<sup>286</sup> *Burch v. Farrows Bank, Ltd.* [1917] 1 Ch. 606.

<sup>287</sup> *In re Hayman, Christy & Lilly, Ltd.* (No. 2) [1917] 1 Ch. 545.

<sup>288</sup> *North Pacific Lumber Co. v. British American Tr. Co.* (1915) 23 Br. Col. 332, 340.

<sup>289</sup> *Supra*, p. 31.

was the promotion of the welfare of cyclists had power to devote a part of its funds to the payment of an annuity to its retired secretary;<sup>290</sup> by what method of computation the fixed value of certain shares of stock in a closed corporation should be ascertained;<sup>291</sup> and specific declarations have been sought that a company was under a duty to apply its profits, after certain deductions, to the payment of cumulative dividends;<sup>292</sup> that a company had no power to forfeit fully paid shares on the ground that it had a lien on them for the enforcement of a claim of the company against its members, and this even before there was an attempt to enforce the by-law mentioned;<sup>293</sup> or that certain resolutions or proposed actions were *ultra vires*.<sup>294</sup>

*Contracts.* Probably one of the most useful functions of the declaratory judgment in preventing litigation lies in the fact that it enables parties to obtain in case of doubt and in advance of the necessity of acting upon their own interpretation of their obligations, with the resulting invitation of a lawsuit, an authoritative judicial interpretation of their mutual rights, powers, duties, etc., under written instruments. In the modern economic world, in which contracts constitute the normal instrument of business relations, it is of estimable value to have at the disposal of the parties an official judicial agency to which they may turn at any time to settle disputes arising in the performance of the contract. In England and some other countries, in order to obtain a judicial construction of a contract, it is unnecessary to resort to the crudity of breaking it, either by repudiation or otherwise, or, to avoid a lawsuit, of permitting the other party to enforce his own interpretation of his obligations under it. Yet in this country we are driven to this extreme. It is true that parties now frequently provide their own forum for settling differences and disputes by the insertion of arbitration clauses in their contracts, but this is still exceptional and lacks some of the authority of judicial decision. There seems no logical reason why the state, instead of throwing parties upon the necessarily unauthoritative advice of counsel and thus often nourishing the seed of a difference of interpretation into a full-grown lawsuit, should not furnish an official forum, its regular courts, for the settlement of differences arising out of the construction and interpretation of contracts.

Before taking up some of the illustrations of this useful function of the courts in other countries, attention may be directed to their

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<sup>290</sup> *Cyclists Touring Club v. Hopkinson* (1910) 101 L. T. 848.

<sup>291</sup> *Collins v. Sedgwick* [1917] 1 Ch. 179; see also *In re Condran* [1917] 1 Ch. 639.

<sup>292</sup> *Ewing v. Israel and Oppenheimer, Ltd.* (1917, Ch.) 118 L. T. 99.

<sup>293</sup> *Hopkinson v. Mortimer, Harley & Co. Ltd.* [1917] 1 Ch. 646.

<sup>294</sup> *Cope v. Crossingham* [1908] 2 Ch. 624, 637; (C. A.) [1909] 2 Ch. 148. *Grainger v. Order of Canadian Home Circles* (1914) 31 Ont. L. Rep. 461.

power to determine and declare the legal character of writings whose nature is uncertain or disputed. Thus, the courts of England or of her colonies have been asked to determine whether certain letters and memoranda constituted a contract;<sup>295</sup> whether certain regulations of the colonial office and the spending of money by plaintiff in reliance thereon constituted a contract;<sup>296</sup> whether a certain indorsement on an insurance policy amounted to a valid assignment thereof;<sup>297</sup> whether a certain document constituted a settlement<sup>298</sup> or a valid will;<sup>299</sup> and whether certain entries in books were "advances" in the sense of the testator's will.<sup>300</sup>

Coming now to the numerous questions which have involved the construction and interpretation of contracts, actions have on several occasions been instituted for a declaration that a certain contract was no longer binding on the plaintiff or was binding on the defendant. Among the former of these cases, which seeks a negative declaration of privilege (absence of duty), the case of *Société Maritime et Commerciale v. Venus Steam Shipping Co. Ltd.*<sup>301</sup> is a leading one. Here the plaintiffs had undertaken by contract to load ore on steamers to be furnished by one L., the alleged assignor of the defendants, for five years. The plaintiffs claimed that there was no valid assignment to the defendants, that L. was not the defendants' agent, and that there was no novation. As the original contract had over a year still to run, and as plaintiffs did not wish to break it and subject themselves to an action for damages, they availed themselves of the valuable privilege of seeking from the court a declaration that the contract was no longer binding on them. In making the declaration sought, Channell, J., remarked:

"Showing a necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to perform it and then to be liable to heavy damages for not performing it for the space of the next one and one-half years. If they are wrong, they would be liable for damages down to the time of the judgment of the Court while they are refusing to perform; but upon the Court saying that they were bound, they would then say: 'We will now go on with it for the remainder of the time.' I think that is a sufficient reason [for making the declaration]."<sup>302</sup>

<sup>295</sup> *Lovesy v. Palmer* [1916] 2 Ch. 233.

<sup>296</sup> *Lantour v. Atty. Gen.* (1865) 5 N. R. 102, 231.

<sup>297</sup> *In re Williams* (C. A.) [1917] 1 Ch. 1.

<sup>298</sup> *Simpson v. Commissioner of Stamp Duties* (1917, N. S. W.) 17 St. Rep. 217.

<sup>299</sup> *Badenach v. Inglis* (1913) 29 Ont. L. Rep. 165.

<sup>300</sup> *In re Deprez* [1917] 1 Ch. 24.

<sup>301</sup> (1904) 9 Com. Cas. 289.

<sup>302</sup> See also *West Ham Corp. v. Sharp* [1907] 1 K. B. 445; *Hulton v. Hulton* [1916] 2 K. B. 642 (declaration sought by a married woman that she was not

So declarations have been sought that a contract was not binding because the promisee was a money-lender not registered according to law,<sup>303</sup> or, in Germany, because it was not authenticated by a notary.<sup>304</sup> On the other hand, declarations have been sought that contracts were binding which the promisor had either repudiated or threatened to repudiate. In this case the declaratory action is a milder substitute for the executory action, but has a special advantage when the contract is one involving a continuous performance and no interruption or substitution of damages for performance is desired.<sup>305</sup>

The great importance of this power to make declarations of the jural relations of parties under a contract has been strikingly illustrated during the last few years when the English courts have been called upon to declare the effect of the war on contracts of various kinds. Parliament assisted this judicial function by providing in the Legal Proceedings against Enemies Act, 1915, that a British subject or corporation might claim a declaration against an enemy subject or corporation, provision being made for substituted service, "as to the effect of the war on rights or liabilities under a contract entered into before the war." Numerous cases of this kind have arisen. In the recent case of *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*<sup>306</sup> the plaintiffs, an English company owning copper mines in Spain, had contracted before the war to sell ore to German companies over a number of years. The contract contained a suspensory clause providing that if owing to war the sellers should be prevented from shipping, the obligation should be suspended during the continuance of the impediment. When war broke out part of the contract was still unexecuted. The plaintiffs claimed a declaration that the war had terminated and not merely suspended the contract. The House of Lords granted the declaration on the ground (1) that performance had become illegal during the war, and (2) that the suspensory clause was void because it was against public policy that an English company should be bound, even after the war, to confer an advantage on a Germany company.<sup>307</sup>

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bound by a certain contract of separation obtained from her by fraud); to the same effect, see *Slingerland v. Slingerland* (1910) 109 Minn. 407, 410, 124 N. W. 19.

<sup>303</sup> *Lodge v. National Union Investment Co. Ltd.* [1907] 1 Ch. 300 (not granted).

<sup>304</sup> (1910) 73 R G, 272.

<sup>305</sup> *Holt v. A. E. G. Electric Co.* [1918] 1 Ch. 320 (Controller of Enemy Property claimed that he was not bound by agreement for services between plaintiff and defendant company. Plaintiff's request for a declaration that he was so bound was granted). See also, for Germany, (1906) 62 R G, 417.

<sup>306</sup> (H. L.) [1918] A. C. 260.

<sup>307</sup> See also *Zinc Corporation, Ltd. v. Hirsch (C. A.)* [1915] 1 K. B. 541; *Orconera Iron Ore Co. Ltd. v. Fried-Krupp A. G.* (1918, C. A.) 118 L. T. 237. In *Hugh Stevenson & Sons, Ltd. v. A. G. für Cartonnagenindustrie* [1918] A. C. 239, the House of Lords declared the termination of a partnership and the right of the German partners to share after the war in a certain part of the profits derived during the war from their share.

Some other cases involve equally interesting questions. In *Metropolitan Water Board v. Dick Kerr & Co.*<sup>308</sup> the performance of a contract for the construction of a reservoir was interrupted by the Minister of Munitions, who ordered the defendants to cease work, to remove a large part of the plant (which by the contract was to belong to the plaintiffs), and to sell it on behalf of the government to certain munition factories. Defendants asserted that by reason of the stoppage of the work and the uncertain duration of the war the contract was terminated, whereupon the plaintiffs sought a declaration that the contract was suspended but not terminated, and that they were entitled to the proceeds of the plant when sold. The Court of Appeal denied the declaration and held the contract terminated, reading into the contract an implication that defendants' obligations under it should cease if the government made performance illegal or impossible.<sup>309</sup>

Among the various kinds of contracts which have recently received interpretation by declaration mention may be made of the following: In a contract for services, where plaintiff was to be paid by a percentage of the net profits, the question was raised for declaration whether the excess-profits duty was to be deducted in order to arrive at the net profits;<sup>310</sup> in *Stretch v. Scout Motors, Ltd.*<sup>311</sup> plaintiff sought and obtained a declaration of immunity from the forfeiture of a war bonus payable for not leaving defendant's service, on the ground that he did not leave voluntarily but had been ordered to leave by the Minister of Munitions. Two recent cases arose under freight contracts. In one, a ship bound from Tampa, Fla., to Hamburg, was compelled by the outbreak of war to put into an English port, and the owners sought a declaration that as the further prosecution of the voyage became illegal, they were entitled to freight money from the defendants.<sup>312</sup> In the other, the master had abandoned a torpedoed ship which was ultimately brought into port by salvors. The owners of certain cargo on board sought a declaration, which was granted, that in view of the master's abandonment, they were entitled to the cargo without payment of freight.<sup>313</sup>

<sup>308</sup> (C. A.) [1917] 2 K. B. 1.

<sup>309</sup> See also for other declarations of the effect of war on different contracts: *Marshall v. Glanvill* [1917] 2 K. B. 87 (agency); *Smith, Coney & Barrett v. Becker, Gray & Co.* (C. A.) [1916] 2 Ch. 86; *Tingley v. Müller* [1917] 2 Ch. 144 (sales); *Seligman v. Eagle Insurance Co.* [1917] 1 Ch. 519 (insurance).

<sup>310</sup> *S. J. & E. Fellows, Ltd. v. Corker* [1918] 1 Ch. 9; *Thompson Bros. & Co. v. Amis* [1917] 2 Ch. 211. But see *William Hollins & Co. v. Paget* [1917] 1 Ch. 187.

<sup>311</sup> (1918, K. B.) 144 L. T. 425.

<sup>312</sup> *St. Enoch Shipping Co. Ltd. v. Phosphate Mining Co.* [1916] 2 K. B. 624.

<sup>313</sup> *Newsam v. Bradley* (1917, C. A.) 118 L. T. 78. For the interpretation of certain other contracts see *In re Blake* [1917] 1 Ch. 18 (effect of unexecuted

*Statutes.* Statutes, executive regulations and ordinances are somewhat analogous to written instruments, and their construction or interpretation has frequently been involved in the course of actions for a declaration of jural relations. The Scotch courts have said that they will not make abstract interpretations of statutes,<sup>314</sup> this is probably true of all courts. But if the determination of a certain right, privilege, power or immunity requires the construction or interpretation of a statute, there seems no valid reason why it should not be made in declaratory actions as it is in executory actions.<sup>315</sup>

Among recent declaratory judgments in England which directly involved the construction of statutes we may mention *In re Monckton's Settlement*,<sup>316</sup> determining that plaintiff had the power of a tenant for life under the Land Settlements Acts, 1882 and 1890; *Flint v. Attorney-General*,<sup>317</sup> declaring that plaintiff as a minister was not exempt from military service under the Army Act, 1881, and Military Service Act, 1916; *In re Moxon*,<sup>318</sup> declaring that the applicant trustee had the power to appoint the Public Trustee as sole trustee in his stead under the Trustee Act, 1893; *In re Renishaw Iron Co., Ltd.*<sup>319</sup> declaring that workmen could bring actions under the Workmen's Compensation Act, 1906, directly against the insurance companies with whom their bankrupt employers had insured their liability to compensation; and other cases too numerous to mention in detail.<sup>320</sup>

Such actions have long been customary in Scotland, where declarations of liability or disability have been sought and maintained against public authorities under the Canal Act,<sup>321</sup> the Railway Act,<sup>322</sup> the Burgh

contract of sale on a testator's property, whether it was realty or personalty); *Dyson v. Peat* [1917] 1 Ch. 99 (agency). For an interesting German case see (1897) 40 R G, 97 (contract of two former partners not to engage in competing business; one sought a declaration that he was privileged to become an employee without violating the contract; it was not granted).

<sup>314</sup> *Balfour v. Malcolm* (1842) 1 Bell App. 163; *Todd and Higginbotham v. Burnet* (1854) 16 D. 794.

<sup>315</sup> This was expressly held in the Scotch case of *Sullivan v. Close* (1898) 6 Sc. L. T. 2, "if the pursuer [plaintiff] shows an interest to have the meaning declared." See the English Act of 1850, *supra*, p. 7.

<sup>316</sup> [1917] 1 Ch. 224.

<sup>317</sup> [1918] 1 Ch. 216.

<sup>318</sup> [1916] 2 Ch. 595.

<sup>319</sup> [1917] 1 Ch. 199.

<sup>320</sup> See *In re Wells and Hopkinson's Contract* [1916] 2 Ch. 289; *In re Scott* (C. A.) [1916] 2 Ch. 268; *Taff Vale Ry. Co. v. Cardiff Ry. Co.* (C. A.) [1917] 1 Ch. 299; *Ellis v. Duke of Bedford* (C. A.) [1899] 1 Ch. 499, 515.

<sup>321</sup> *Macdonell v. Caledonian Canal Commissioners* (1830) 8 S. 881; *Tennant v. Turner* (1837) 16 S. 192.

<sup>322</sup> *Glasgow City & Dist. Ry. Co. v. Magistrates of Glasgow* (1884) 11 R. 1110.

Police (Scotland) Act, 1892,<sup>323</sup> and other acts.<sup>324</sup> Declarator appears to be the usual procedure in Scotland for trying the legality of the acts of public officers.

The validity or effect of various executive regulations has recently been under examination in declaratory actions brought by private individuals whose privileges or immunities depended upon the construction of such regulations or the legality of powers exercised under them.<sup>325</sup> The determination of the invalidity of a municipal ordinance is occasionally sought by declaratory action.<sup>326</sup>

Probably in no other country is legislation so frequently held unconstitutional as in the United States. Judgments holding statutes or ordinances unconstitutional are in effect declaratory. In practice, however, the judgment usually includes some decree, though preceded by a declaration. The power to render declaratory judgments might have shortened considerably the complicated procedure by way of injunction, already litigated before three different courts,<sup>327</sup> through which the New York *American* is endeavoring to prevent the enforcement of different ordinances enacted by the municipal authorities of Mount Vernon, N. Y., designed to bar the Hearst newspapers from sale in Mount Vernon. The actual issue involves merely the constitutionality of the principal ordinance. In countries having a similar system of judicial control over legislation, the unconstitutionality of a particular statute has been maintained in the form of a declaratory action and judgment.<sup>328</sup>

<sup>323</sup> *Tennent v. Commissioners* (1894) 31 Sc. L. Rep. 619.

<sup>324</sup> *Leith Police Commissioners v. Campbell* (1866) 5 M. 251; *British Fisheries Soc. v. Magistrates of Wick* (1872) 10 M. 426; *Stewart v. Parochial Board of Keith* (1869) 8 M. 26; *Hogg v. Parochial Board of Auchtermuchty* (1880) 7 R. 986.

<sup>325</sup> Whether a certain regulation came into effect at the date of its signature or of its publication, *Johnson v. Sargent & Sons* (1917, K. B.) 118 L. T. 95; effect of treasury regulations for deposit of securities, *In re Oppenheimer* [1917] 1 Ch. 274; claimant's privilege of not giving certain information under a printed form to Inland Revenue Commissioners, *Dyson v. Attorney General* (C. A.) [1911] 1 K. B. 410; invalidity of regulations of shipping controller requisitioning services (not ships) of owners and appropriating their profits, *China Mutual Steam Navigation Co. Ltd. v. MacLay* [1918] 1 K. B. 33.

<sup>326</sup> See *Bourgon v. Township of Cumberland* (1910) 22 Ont. L. Rep. 256. *Hair v. Town of Medford* (1914, A. D.) 31 Ont. L. Rep. 124.

<sup>327</sup> *Star Co. v. Brush*, N. Y. LAW JOURNAL, Sept. 12, 1918.

<sup>328</sup> See *Colonial Sugar Refining Co. v. Atty. Gen.* (1912, Australia) 15 C. L. R. 182. The Ontario Judicature Act (R. S. O. 1914, c. 56, sec. 20) authorizes the Supreme Court at the instance of the Attorney General for Canada or of Ontario to make a "declaration as to the validity of any statute . . . though no further relief be prayed or sought." See *Atty. Gen. for Canada v. Atty. Gen. of Ontario* (1893) 23 Can. S. C. 458, and annotations of this section in Snider's *Annotations* (1914) p. 102. This is in the nature of an advisory opinion, although the statute calls it a "judgment." Under the United States Constitution such a declaration



Even the meaning of the judgment or decree of a court<sup>329</sup> or of the ambiguous award of arbitrators<sup>330</sup> may be sought by declaratory action. It is doubtful, however, whether its validity can be attacked in this form,<sup>331</sup> inasmuch as codes of procedure usually provide means for setting aside invalid judgments or awards.

## TITLE TO PROPERTY

One of the questions for the determination of which the declaratory judgment has proved most adaptable is the matter of conflicting or doubtful claims of title to land or of any right, privilege, power or immunity with respect to land. The history of the simplification of procedure for trying title encourages the hope that the more general reform in procedure involved in the declaratory judgment will ultimately obtain sufficient support to secure its legislative recognition. From the former very technical real action by which questions of ownership of realty were decided we came to the mixed action of ejectment, used first to decide questions of possession and then indirectly to determine questions of title under the fiction of a decision merely as to the right of possession.<sup>332</sup> While in some of our states this is still the method of trying the title to land, England has not stopped her progress. The action for the recovery of land under the Judicature Acts, while primarily directed to the recovery of possession, also enabled the plaintiff to apply for a declaration that he is entitled to the land, while a claimant to possession in fee simple has been able to do so since 1862.<sup>333</sup> Since 1883, the usual method of trying title or any of the constituent jural relations with respect to land, *e. g.*, the right to walk over another's land or the privilege of freedom from the

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would have to involve a litigated "case" or "controversy" between private parties. *Muskrat v. United States* (1911) 219 U. S. 346, 41 Sup. Ct. 250. In *Shredded Wheat Co. v. City of Elgin* (1918, Ill.) 120 N. E. 248, the plaintiff sought to enjoin the enforcement of a municipal ordinance, on the ground of its unconstitutionality. The court refused to pass upon the ordinance until the plaintiff had undertaken to violate it and prosecution been begun to recover a penalty under it. If invalid, said the court, the prosecution would fail and the plaintiff would not be injured; if valid, there was no ground on which its enforcement should be enjoined. The benefits of the declaratory judgment procedure in such a case are apparent.

<sup>329</sup> *Ross v. Mackenzie* (1836) 14 S. 845; *Parke's Curator (Barstow) v. Black* (1870) 8 M. 671.

<sup>330</sup> *Lofthouse Colliery v. Ogden* [1913] 3 K. B. 120.

<sup>331</sup> Although this has been done in India, where judgment was rendered against a minor without appointment of a guardian *ad litem*. *Purno v. Maharajadhiraj* (1913) 18 CALCUTTA L. J. 18.

<sup>332</sup> See Sedgwick and Wait, *The History of the Action of Ejectment*, in 3 *Essays in Anglo-American Legal History*, 611, 636.

<sup>333</sup> 25 & 26 Vict. ch. 67, sec. 48. See also *Gledhill v. Hunter* (1880) 14 Ch. D. 492.

right of another, has been by declaratory action. The equitable bills to quiet title and particularly the bill to remove cloud from title, together with the modern statutory suit to quiet title, serve in many of our states to try disputed questions of title.<sup>334</sup> But these remedies are subject to various limitations, and the two former serve only as incidental to some executory relief. The statutory suit to quiet title, which in some states (*e. g.*, Connecticut), includes within its purview personal as well as real property and may be instituted by a person in or out of possession claiming any kind of contested interest in the land, offers a close approach to the action for declaration of title, and should be adopted by all of our states.

The questions relating to rights and other legal relations in respect to property determined by declaratory judgment often, although by no means usually, arise under wills or settlements, and to some extent have already been considered. They may be brought to determine adverse claims to the same interest in the land, by the person in or out of possession or claiming some interest in order to obtain a determination and confirmation of his interest or of his freedom from interference with that interest by some adverse claimant.

Among adverse claimants to the same interest, questions of conflicting title frequently come before land registration officers in countries where the state determines, registers and guarantees the title. In this country, where the Torrens system is not yet compulsory, and in England, this kind of declaration is of little importance. In Ireland the Landed Estates (and Land Judges') Court has jurisdiction to make declarations of title. In India the question is frequently raised under section 283 of the code of civil procedure by persons claiming interests in property under attachment; in this country that is possible in some states by sheriff's jury.<sup>335</sup> But in India no declaration of title can be obtained by virtue of the general power to make declaratory decrees under the Specific Relief Act if the plaintiff might have obtained any coercive relief. Under section 17 of the English Married Women's Property Act, 1882, if a question arises between husband and wife as to the title or possession of property, either party may apply by originating summons for an order determining such question.<sup>336</sup> We have already adverted to the fact that in many of our states the statutory suit to quiet title serves as the best means of trying disputed questions of title.

Declaratory judgments upon adverse claims to interests in land have dealt with many varieties of questions, including conflicting claims by the public and by private individuals to the fee of a road,

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<sup>334</sup> *Supra*, p. 30.

<sup>335</sup> *Supra*, p. 29.

<sup>336</sup> *In re Married Women's Property Act, 1882* (C. A.) [1917] 2 K. B. 72.

one asserting it to be a public, the other a private road;<sup>337</sup> conflicting claims of private individuals to the same realty<sup>338</sup> or to the same privilege under lease or license.<sup>339</sup>

Declarations have also been sought to determine the nature of the claimant's interest in certain land, *e. g.*, of a reversionary lessee whose term was to commence more than twenty-one years after its date;<sup>340</sup> the amount of claimant's share in property;<sup>341</sup> or the quantity, quality or priority of plaintiff's or defendant's tenure<sup>342</sup> or interest.<sup>343</sup>

It often becomes of importance to a person who claims title to land and the power to convey it to obtain from a court a judicial declaration and confirmation of his title as an assurance to a prospective vendee that he is not purchasing a defective or unmarketable title. This valuable function of the declaratory judgment has been invoked on several occasions, generally by the vendor<sup>344</sup> but occasionally by the vendee who asks a declaration that he is under no duty to take

<sup>337</sup> *Gooderham v. City of Toronto* (1891) 21 O. R. 120, 19 A. R. 641; *The Mayor, etc. of Lower Hutt v. Yerex* (1904, N. Z.) 24 S. C. 697; *Chuni v. Ram* (1888) 15 Indian L. Rep., Calcutta, 460.

<sup>338</sup> *In re Alston* [1917] 2 Ch. 226; *In re Bogg* [1917] 2 Ch. 349; *Grierson v. Sandstring School Board* (1882) 9 R. 437; *Redman v. Permanent Trustee Co.* (1917, N. S. W.) 17 St. R. 60; *Nasir v. Arman* (1912) 17 CALCUTTA L. J. 118; *Rameshevar v. Provabati* (1914) 20 CALCUTTA L. J. 23; (1900) 48 R. G. 367, 370.

<sup>339</sup> *North Pacific Lumber Co. Ltd. v. British-American Trust Co. Ltd.* (1915) 23 Br. Col. 332; (1898) 41 R. G. 345. The German courts at one time espoused the view that there was no "legal relation" between two adverse claimants to the same res.

<sup>340</sup> *Mann, Crossman & Paulin, Ltd. v. Registrar of Land Registry* [1918] 1 Ch. 202.

<sup>341</sup> *Kennedy v. Dodson* [1895] 1 Ch. 334; *Boboo v. Mitrajit* (1872) 8 Bengal L. R. 382; *Brij v. Durga* (1898) 20 Indian L. Rep., Allahabad, 258.

<sup>342</sup> *Kali v. Golam* (1886) 13 Indian L. Rep., Calcutta, 3; *Re Darnley's Estate* (1870, Ireland) 3 Irish L. T., Misc. 741.

<sup>343</sup> *Gascoigne v. Gascoigne* [1918] 1 K. B. 223 (that defendant held title as trustee for plaintiff). See *Donohoe v. Rogers* (1914) 168 Cal. 700, 144 Pac. 958; *Porten v. Peterson* (1918, Minn.) 166 N. W. 184 (that plaintiffs were equitable mortgagees). See also *Hodge v. Atty. Gen.* (1838) 3 Young & C. 342. *In re Bogg* [1917] 2 Ch. 239 (that certain land was subject to a use, or as in *Norman v. Johnson* (1860) 6 Jur. n. s. 905, to a lien to the amount of an annuity); the priority of plaintiff's claim over a certain mortgage (*Pearce v. Bulteel* [1916] 2 Ch. 544); whether certain property was to be treated as realty or personalty (*In re Alston* [1917] 2 Ch. 226); whether there was a merger of estates (*In re Fletcher* [1917] 1 Ch. 147).

<sup>344</sup> Declaration that plaintiff had power of tenant for life and could as such give good title (*In re Trafford's Settled Estates* [1915] 1 Ch. 9). See also *In re Burroughs-Fowler* [1916] 2 Ch. 251. That trustees had power to give good title to a life-rent (*Chaplin's Trustees v. Hoile* (1890) 28 S. L. R. 51). *Earl of Mansfield v. Stewart* (1846) 5 Bell's App. 158. *Goburdhun v. Munnoo* (1871) 15 W. R. 95. See illustrations (b), (c), (f) and (g) under sec. 42 of the Indian Specific Relief Act, 1877, Collett, *op. cit.* 221.

a defective title.<sup>345</sup> Often such a request for a confirmation of title serves merely purposes of general assurance,<sup>346</sup> but it is probable that it will not be granted, unless the title is in danger of question or attack.<sup>347</sup> Reference has already been made to the fact that in some jurisdictions a claimant to title by adverse possession may obtain a judicial confirmation of his title.<sup>348</sup>

The action for the establishment of title or of some incidental legal relation is often brought in the form of a request for a negative declaration of privilege or immunity as against the defendant. Before 1883, such an assertion of privilege or immunity was not granted in England, because the plaintiff was said to have no cause of action. Only by the equitable remedy of removal of cloud from title, within its limited scope and conditions, was relief obtainable. So in *Rooke v. Kensington*,<sup>349</sup> where the plaintiff asked a declaration that his legal title was unaffected by an equitable claim of the defendant of which he had no notice when he acquired the legal title, the declaration was refused. Such declarations may now be made.<sup>350</sup> So whenever one's title is placed in jeopardy by some act or claim of another, a suit will lie for a declaration that such act or claim is void as against the plaintiff. Thus in India, declarations are frequently asked and made that attempted alienations or adoptions, impairing the interests of reversioners, are void,<sup>351</sup> or that trespassers under claim of right have no right.<sup>352</sup> In *Austen v. Collins*,<sup>353</sup> often cited under the head of declaratory judgments, a tenant for life obtained a declaration that his life-estate had not been divested by his non-compliance with a certain clause under a will, the failure having been due to circumstances beyond his control.

<sup>345</sup> *In re Wills & Hopkinson's Contract* [1916] 2 Ch. 289.

<sup>346</sup> See statute of (1862) 25 & 26 Vict. ch. 67, sec. 48; and *Gledhill v. Hunter* (1880) 14 Ch. D. 492. *In re Kenny's Estate* [1897] 1 I. R. 318. *Billing v. Welch* (1870, Ir.) 6 Q. B. 64; *Chunia v. Ramdial* (1877) 1 Indian L. Rep., Allahabad, 360. Declaration that claimant was a mortgagee: *Gabin v. Udai* (1870) 6 BENGAL L. R. 320. That plaintiff was lessee under a valid and subsisting lease: *West v. Gwynne* [1911] 2 Ch. 1; *Cornish v. Boles* (1914, A. D.) 31 Ont. L. Rep. 505.

<sup>347</sup> *Earl of Galloway v. Garlies* (1838) 16 S. 1212; *Magistrates of Edinburgh v. Warrender* (1863) 1 M. 887. See also *The Manar* [1903] P. 95.

<sup>348</sup> *Supra*, p. 31.

<sup>349</sup> (1856) 2 K. & J. 753, 760, 761.

<sup>350</sup> *Fing Ping Shun v. Tong Shun* (P. C.) [1918] A. C. 403; *Hollard v. Ollivier* (1881, N. Z.) 1 S. C. R. 197.

<sup>351</sup> *Venkatanarayana v. Subbamune* (1915) L. R. 42 Indian App. 125. See Illustrations (e) and (f) to sec. 42 of Specific Relief Act, Collett, *op. cit.*, 222.

<sup>352</sup> *Bissessuri v. Baroda* (1884) 10 Indian L. Rep., Calcutta, 1076; *Sarat v. Nritya* (1910) 13 CALCUTTA L. J. 284. See also *Collis v. Amphlett* (C. A.) [1918] 1 Ch. 232.

<sup>353</sup> (1886, Ch.) 54 L. T. 903.

An excellent illustration of the efficacy of the declaratory action to settle disputed rights without stirring up legal hostilities lies in the field of easements and servitudes. With certain limited statutory exceptions, the present method of trying disputed claims to easements is for the claimant of the easement to endeavor to enjoin the owner of the land from interfering with his easement and in addition to sue for damages if he does, or for the owner of the land to take similar steps to protect himself or secure redress. Only then can a court determine whether in fact there existed a valid easement, the only matter in issue. In the Roman law, the person claiming a servitude had an *actio in rem confessoria*, the owner of the land disputing the servitude an *actio in rem negatoria*. In countries enjoying the benefits of declaratory procedure, such questions are generally tried by declaratory action. Thus, claimants to a right of way,<sup>354</sup> to subterranean support of surface lands,<sup>355</sup> to the use of the foreshore,<sup>356</sup> and to the unimpeded flow of water<sup>357</sup> have brought declaratory actions to confirm their claims. On the other hand, the owners of land have sought declarations of privilege and right to the effect that defendants had no right of way,<sup>358</sup> no right and no privilege to run their rain-water on plaintiff's land,<sup>359</sup> or to send their sewage through plaintiff's sewer,<sup>360</sup> no easement of light,<sup>361</sup> or no servitude over plaintiff's land.<sup>362</sup>

Questions of title to personal property may likewise be tried by declaratory action, either in the affirmative or in the negative form. Thus during the present war the British Admiralty has frequently requisitioned ships under charter, and the question as to the respective right of owner and charterer to the compensation due has been settled by declaratory action between the two claimants.<sup>363</sup> Conflicting questions of title to certain funds as between private individuals<sup>364</sup> or

<sup>354</sup> *Nicholls v. Nicholls* (1899, Ch.) 81 L. T. 811; *Gooderham v. City of Toronto* (1891) 21 O. R. 120, 19 A. R. 64; *In re Jameson's Estate* [1895] Ir. L. R. 469.

<sup>355</sup> *Davies v. Powell Duffryn Steam Coal Co.* [1917] 1 Ch. 488.

<sup>356</sup> *Champion and White v. City of Vancouver* (1916) 23 Br. Col. 221.

<sup>357</sup> *Wuzeerooddeen v. Sheobund* (1869) 11 W. R. 285.

<sup>358</sup> *Taff Vale Ry. Co. v. Cardiff Ry. Co.* (C. A.) [1917] 1 Ch. 299; *Thornhill v. Weeks* [1913] 1 Ch. 438, 464; *Magistrates of Edinburgh v. Warrender* (1863) 1 M. 887. See illustration (b) to sec. 42 of Indian Specific Relief Act, Collett, *op. cit.* 221.

<sup>359</sup> *Fay v. Prentice* (1845) 1 C. B. 828.

<sup>360</sup> *Islington Vestry v. Hornsey U. D. C.* (C. A.) [1900] 1 Ch. 695.

<sup>361</sup> *Ankerson v. Connelly* [1906] 2 Ch. 544; [1907] 1 Ch. 678.

<sup>362</sup> *Llandudno U. D. C. v. Woods* [1899] 2 Ch. 705 (to hold religious services on plaintiff's seashore); *Surjamani v. Shaik* (1912) 15 CALCUTTA L. J. 36, notes. Rights of easement or servitude are triable by declaration in Germany, Petersen, *op. cit.* 499.

<sup>363</sup> *London-American Maritime Tr. Co. v. Rio de Janeiro Tramway etc. Co.* [1917] 2 K. B. 611; *Chinese Mining etc. Co. v. Sale & Co.* [1917] 2 K. B. 599.

<sup>364</sup> *Davidson v. Davidson* (1906) 14 S. L. T. 337.

between private individuals and the government,<sup>365</sup> or of title to specific chattels,<sup>366</sup> may be determined by declaratory judgment. Questions of priority of different classes of creditors, *e. g.*, mortgagees and material-men of a ship,<sup>367</sup> and adverse questions of title to *choses* in action,<sup>368</sup> have also been determined by this procedure. Declaratory actions have been brought to try the title to such authorized monopolies as patent,<sup>369</sup> copyright<sup>370</sup> or trademark<sup>371</sup> privileges and other franchises.<sup>372</sup>

#### OBLIGATIONS NOT CONTRACTUAL

Aside from the various classes of questions above presented which have proved themselves eminently suited to solution by declaratory action, other questions of more miscellaneous character may, for purposes of presentation, be grouped under the general, if not always juristically accurate, classification of non-contractual obligations. These will include questions of administrative law arising between the state and the individual. As a matter of arrangement the cases will be grouped according to the principal jural relation which was

<sup>365</sup> *Robson v. Atty-Gen.* [1917] 2 Ch. 18.

<sup>366</sup> *Rawlinson v. Mort* (1905) 93 L. T. 555; *Pritchett v. Currie* (C. A.) [1916] 2 Ch. 515. In India, this even includes questions of conflicting claims to the possession of a wife. *Yumanabai v. Narayan* (1876) 1 Indian L. Rep., Bombay, 164, 167. For Germany, see (1899) 44 R G, 163, 165.

<sup>367</sup> *The Manar* [1903] P. 95. See also sec. 146 of the German Bankruptcy Code.

<sup>368</sup> Shares of stock, *Coleman v. London County etc. Bank* [1916] 2 Ch. 353; Policies of insurance, *Sehigman v. Eagle Insurance Co.* [1917] 1 Ch. 519. Whether a certain claim was part of judgment debtor's assets, *Steward v. Guibord* (1903) 6 Ont. L. Rep. 262.

<sup>369</sup> *N. E. Marine Engineering Co. v. Leeds Forge Co.* [1906] 1 Ch. 324, where the plaintiffs claimed a declaration that defendants' patent was invalid, and that the former had not infringed any legal rights of the latter. The declaration was denied because there was a statutory way of trying the question. But the principle of such actions was admitted. Why should it be necessary for a new patentee to build a factory and begin manufacturing an article and causing injury before a contesting older patentee alleging interference can bring his action? Why should not *either* one of them before any expense is incurred or damage is caused be able to test the validity of their conflicting claims by declaratory action?

<sup>370</sup> *British Actors Film Co. Ltd. v. Glover* [1918] 1 K. B. 299.

<sup>371</sup> *Bruce v. Commonwealth Trademark Label Asso.* (1907, Aus.) 4 C. L. R. 1569. For a case in Germany, see (1905) 61 R G, 18, 19.

<sup>372</sup> *Hammerton v. Earl of Dysart* (H. L.) [1916] 1 A. C. 57 (a ferry franchise). Jurisdiction by declaration was denied in Queensland on a question of contested title to an office in a voluntary association: *Murray v. Parnell* (1909) Q. S. C. 65. But a public officer in Scotland was allowed to test his title to the office by declarator. *Goldie v. Christie & Petrie* (1868) 6 M. 541. In England and the United States the writ of quo warranto is the procedure adopted for this purpose.

placed in issue, so that the discussion will follow the order of affirmative declarations of right or duty, power or liability, and negative declarations of privilege or no-right, immunity or disability. It may again be observed that frequently one principal jural relation is placed in issue for the purpose of proving the existence of other jural relations, and the declaration of one pair of jural relations, such as a right and its correlative duty, will practically always imply the existence of other pairs of relations.

The declaration of right proper, or one's affirmative claim to the performance of a duty by another, is illustrated in declaratory actions by the assertion of a right to recover moneys due the plaintiff, *e. g.*, a declaration that the principal had a right to the secret commissions received by his agent from persons dealing with the principal<sup>373</sup> or that the officers and crew of certain warships had a right to prize-money or to share in prize-money already awarded<sup>374</sup> or to recover the value of requisitioned ships lost by the government.<sup>375</sup> It will be observed that declaratory actions may be brought against the government, although necessarily begun by petition of right or statutory permission, and it may be said that in England and in the United States Court of Claims a declaratory judgment is the only form of judgment that can be rendered against the government, for the court has no power to make an executory decree.

This same advantage of the plaintiff may be demanded in the form of a declaration of the defendant's duty to do something for the benefit of the plaintiff, either to pay a sum of money<sup>376</sup> or to do some specific act,<sup>377</sup> to bear a particular burden,<sup>378</sup> or to forbear from some particular act. Thus, where a newspaper reporter sought a declaration of his right and privilege to enter a public building, the city hall, it was held that the defendant mayor had no right that he should keep out and no privilege to keep him out (*i. e.*, was under a duty to refrain

<sup>373</sup> *Powell v. Jones* [1905] 1 K. B. 11.

<sup>374</sup> *In the matter of the German Cruiser Königsberg* [1917] P. 174; *In re the Battle of the Falkland Islands* [1917] P. 47.

<sup>375</sup> *British & Foreign Steamship Co. v. The King* [1917] 2 K. B. 769. For German cases between private individuals see (1903) 55 R. G. 158, 160; (1911) 75 R. G. 406.

<sup>376</sup> *Atty.-Gen. v. Watson* [1917] 2 K. B. 427 (the payment of estate tax). *Carlton Main Colliery Co. v. Clawley* (C. A.) [1917] 2 K. B. 691 (Sums payable to dependents under Workmen's Compensation Act, 1906). So questions of the incidence of the duty to pay taxes may be tried by declaratory action. *In re Smyth* [1917] 2 Ch. 331; *In re Scott* (C. A.) [1916] 2 Ch. 268.

<sup>377</sup> To keep and maintain a highway of a certain construction and strength. *Atty.-Gen. v. Scott* (1904, K. B.) 20 T. L. R. 630, 633. To convey to the equitable mortgagees (plaintiffs) a legal mortgage. *In re Smith* [1916] 2 Ch. 206.

<sup>378</sup> To bear certain charges for public improvements made by the city, *Corp. of Bristol v. Sinnott* [1917] 2 Ch. 340.

from keeping him out.<sup>379</sup> Declarations have been asked and maintained of the defendant's [secondary] duty to make good any losses which the plaintiff company might sustain now or in the future because of the defendant director's negligent conduct of its affairs<sup>380</sup> or because of the defendant's continuing negligence.<sup>381</sup> If the act and the resulting duty are complete, although the damages cannot yet be estimated, the declaration would of course be a declaration of duty.<sup>382</sup>

The declaration of the plaintiff's power is illustrated by such cases as those already mentioned of a life-tenant who asserts his power of alienation<sup>383</sup> or of a lessee who asserts his power of assignment of the lease without consent of the lessor.<sup>384</sup>

Declarations of the defendant's liability in the technical conceptual sense of that term are infrequent. Those cases in which the court has declared that the defendant is liable to certain duties provided the plaintiff exercises his power to convert this liability into a duty are good illustrations. Thus, where the court declared that the defendant was bound to pay a certain sum provided the plaintiff tendered a receipt,<sup>385</sup> or that the defendant was under a duty to furnish wood from his estate if, as and when the plaintiff municipality requested it,<sup>386</sup> or that the defendant father was under a duty to furnish his plaintiff daughter with an outfit when she married,<sup>387</sup> declarations of liability as well as of conditional duty were made. In these cases the power to convert the liability into a duty resided in the plaintiff, but we believe the jural relation to be the same if the power is vested in a third person. Thus, where a fraternal benefit society asked a declaration against the state that the latter was liable to make good any losses which the plaintiff society might have to meet in the future because of then undisclosed claims of third persons (members) injured in a railroad accident caused by the state's negligence, a case of liability is presented.<sup>388</sup> Perhaps the declarations asked by prospective tax-payers of what their liability to taxes will be in different districts<sup>389</sup> may be classified under the head of liability.

<sup>379</sup> *Journal Printing Co. v. McVeity* (1915) 33 Ont. L. Rep. 166.

<sup>380</sup> *In re Dominion Trust Co. and Machray* (1916) 23 Br. Col. 401.

<sup>381</sup> *Evans v. Manchester etc. Ry. Co.* (1887) 36 Ch. D. 626, 640; *Azeeza v. The Corporation of Calcutta* (1916) 24 CALCUTTA L. J. 562 (duty to compensate for loss which might be sustained through defendant's subsequent removal of certain fixtures).

<sup>382</sup> (1885) 13 R G, 372.

<sup>383</sup> *Supra*, cases cited in note 344.

<sup>384</sup> *Supra*, cases cited in note 284.

<sup>385</sup> *Morton et al. v. Smith* (1864) 3 M. 29.

<sup>386</sup> (1898) 41 R G, 369.

<sup>387</sup> (1901) 49 R G, 370.

<sup>388</sup> (1905) 61 R G, 164, 166.

<sup>389</sup> *Edinburgh & Glasgow Ry. Co. v. Meek* (1849) 12 D. 153.



Probably a greater interest in the use of the declaratory judgment lies in its power to settle questions of privilege or no-right, immunity or disability, where the plaintiff may or may not have any affirmative cause of action, but asks for a declaration in the negative form either that he himself is under no duty to (freedom from the right of) the defendant or that he is under no liability to (immunity from) the defendant's power or control; or else he may assert that the defendant has no right against the plaintiff or has no power over (disability against) him or his jural relations. These various negative forms of declaration warrant closer examination.

The only reason for classifying the assertion of a plaintiff's privilege among negative forms of declaration is because the court's finding is practically always pronounced in the form of the defendant's no-right that the plaintiff shall not act in accordance with his privilege, or of the no-duty of the plaintiff to the defendant. Otherwise, there is nothing inherently negative about a privilege.

Illustration (g) to section 42 of the Indian Specific Relief Act reads as follows:

"A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right [privilege] to hold the property."

But the court's declaration in practice will be in the negative form either that A is under no duty to deliver it to B, or that B has no right to the property. It will be recalled that when a privilege not expressly limited by license is actively contested or its enjoyment obstructed it merges, as against the person interfering, into a right.

The assertion of privilege in the form of plaintiff's no-duty is illustrated by the case of *Guaranty Trust Co. v. Hannay*<sup>390</sup> in which the plaintiffs sought a declaration that they were under no duty to return to the defendants certain sums which had been paid to them. The same form of declaration is illustrated by such cases as the following: the plaintiff claims that a certain contract is no longer binding on him;<sup>391</sup> that he is under no duty to answer certain questions or produce certain documents asked by a legislative commission;<sup>392</sup> that he is under no duty to make certain returns on forms submitted by the commissioner of internal revenue<sup>393</sup>—this case also involved a declaration of immunity inasmuch as the plaintiff contended that the form

<sup>390</sup> (C. A.) [1915] 2 K. B. 536.

<sup>391</sup> *Supra*, note 301.

<sup>392</sup> *Colonial Sugar Refining Co. Ltd. v. The Atty.-Gen.* (1912, Aus.) 15 C. L. R. 182.

<sup>393</sup> *Dyson v. Atty.-Gen.* [1911] 1 K. B. 410; (C. A.) [1912] 1 Ch. 158, 167. *Burghes v. Atty.-Gen.* [1911] 2 Ch. 139, 155; (C. A.) [1912] 1 Ch. 173.

was *ultra vires* (no power). We have mentioned already a case in Germany in which a washing powder placed on the market by the plaintiff was alleged by defendant to have injured her eyes, whereupon plaintiff asked for a declaration that she was under no duty to make good the damage defendant may have sustained.<sup>894</sup>

Privilege, as already observed, is frequently asserted in the form of no-right of the defendant. Thus, we have seen that the owner of land may, as plaintiff, seek a declaration that the defendant has no easement or servitude over his land.<sup>895</sup> So also, an alleged debtor against whom a claim is asserted may seek a declaration that his alleged creditor has no claim (right) against him<sup>896</sup> or no right to assert any other demand to the detriment of the plaintiff.<sup>897</sup> So, where steamship owners asserted their privilege of operating a certain steamer then en route for their own account and of keeping the profits in spite of the Shipping Controller's requisition of the ship, it was held that the Controller had no right to the plaintiff's services and to the running accounts, but that his rights against the plaintiffs arose only after the completion of the ship's voyage; until that time the plaintiffs were privileged and immune from his regulations.<sup>898</sup>

Many possibilities of extending this useful function of a declaratory judgment of privilege as an aid to the stability and security of legal relations suggest themselves. For example, it was nearly twenty years after its enactment before the business world was able to learn authoritatively what the Sherman law actually meant. For some years before the decision of the first case the Department of Justice had held the Sherman law like a sword of Damocles over the heads of large business concerns entering into co-operative agreements, reorganizations and combinations of various kinds and degree. Yet when the Department of Justice was asked whether a specific agreement was a violation of the law, the Department could not and did not answer, asserting first, that that was a question for private counsel and secondly, a question for the courts. So the advice of counsel was sought and their conjecture as to the meaning of the law was followed; and so these large organizations stumbled along carrying enormous responsibilities in the hope that the law had not been violated, until the Department of Justice got ready to try a few test cases. Then

<sup>894</sup> (1909) 71 R G, 68.

<sup>895</sup> *Supra*, notes 358-362; and see *Harrison v. Rutland* [1893] 1 Q. B. 142.

<sup>896</sup> (1899) 44 R G, 183; (1913) 82 R G, 170.

<sup>897</sup> *e.g.*, for a creditor to keep a special security against a bankrupt when he had proved his claim among the general creditors: *In re Pawson* [1917] 2 K. B. 527; to keep plaintiff's name on the list of shareholders when this is a disadvantage to plaintiff: *Kinghorn v. Glenyards Fireclay Co. Ltd.* (1907, Sc.) 14 S. L. T. 683.

<sup>898</sup> *China Mutual Steam Navigation Co. Ltd. v. MacLay* [1918] 1 K. B. 33.

came expensive litigation and an unscrambling of many combinations, a process which represented business destruction and uncertainty and an economic loss and waste impossible of calculation. Why should private business have been left for years in such grave uncertainty? Why should it not have been possible for two or more business concerns contemplating a certain form of co-operative reorganization, yet threatened by the Sherman law, to assert their privilege to enter into and execute the proposed agreements, citing the Attorney-General as a defendant, and request from the courts a declaration of their privilege to act and their right to no interference and of the government's no-right that the concerns should refrain from the execution of these agreements. Then the sword would either have fallen or have been withdrawn and business might have proceeded with some degree of certainty and security. Thus, a simple procedure used as an instrument of preventive justice might have saved the community and private business untold loss, inconvenience and uncertainty.<sup>399</sup>

The last two jural relations which we have undertaken to discuss are immunity (or no-liability) and disability (or no-power). They find large room for application in the field of administrative law in which private individuals may contest the validity of governmental acts by asserting the disability of legislative or administrative authorities to promulgate such state acts or else their disability to enact or issue them, respectively, in the manner pursued, and hence their own immunity from any legal relations that purport to be created by such unlawful or invalid state acts. These jural correlatives of immunity and disability have also, however, as we shall presently see, considerable application in private legal relations.

The declaration of immunity or exemption from taxation has frequently been the object of judicial determination,<sup>400</sup> although the complete or partial invalidity of tax laws or of administrative powers exercised under them is usually asserted in the form of a declaration of

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<sup>399</sup> This procedure has close analogy to the declaration of perpetual silence. The plaintiff cites the defendant who threatens him with a charge or with an action, and the court asks the defendant to prove his charge or ever thereafter remain silent. This proceeding, of ancient origin, which is in force in many countries, may be extended by us to alleviate many of the crudities of our law of libel and slander, in which the necessity of proving a pecuniary injury now constitutes such an important element for practical purposes. Mr. Nathan, in *4 Common Law of South Africa*, 2387, states, that

"it has been held that in a criminal prosecution, where a preliminary examination has not been closed, an accused person is not entitled to a decree of perpetual silence against the Crown. *Ex parte Bok* (1880, Trans.) K. 223." This hardly constitutes a precedent, however, against the preventive action here proposed.

<sup>400</sup> *Re Smyth* (1917, Ch. C. A.) 117 L. T. 793; *Ottawa Y. M. C. A. v. City of Ottawa* (1913) 29 Ont. L. Rep. 582; *Atty.-Gen. of Queensland v. Atty.-Gen. for Commonwealth* (1915) 20 C. L. R. 148; *Hogg v. Parochial Board of Auchtermuchty* (1880) 7 R. 986.

the correlative jural relation of disability (no-power). Exemption from military service is an illustration of immunity,<sup>401</sup> as well as of the privilege of not serving.

Declarations of disability of the defendant, while often combined with declarations of immunity of the plaintiff, are nevertheless emphasized as the principal jural relation in issue when the validity of a state act is contested. Thus, declarations have been sought that particular acts of governmental authorities were *ultra vires* (*i. e.*, that the authority had no power to create any new legal relations by executing them), *e. g.*, the repudiation of an agreement by the postmaster-general,<sup>402</sup> the issuance of certain forms by the internal revenue officers,<sup>403</sup> the requisitioning of certain services and profits of the plaintiffs,<sup>404</sup> the expropriation of certain land,<sup>405</sup> the manner of cancelling certain mining leases by the governor,<sup>406</sup> the method of imposing taxes by local authorities,<sup>407</sup> and the manner of rejecting votes by local officers.<sup>408</sup> So also declarations of disability have been sought against the acts of private persons acting under private acts, charters or agreements. Such declarations have been made against the power of employers to make certain deductions from wages under the Truck Act, 1831,<sup>409</sup> of school authorities to exclude certain poor children,<sup>410</sup> of church authorities to pass a certain sentence of ouster upon a minister,<sup>411</sup> of a corporation to make a certain mortgage and issue certain bonds under it,<sup>412</sup> of a dock corporation to promulgate certain regulations under a private act,<sup>413</sup> of a stock-exchange committee to

<sup>401</sup> *Flinn v. Atty.-Gen.* [1918] 1 Ch. 216. See also *London Assn. of Shipowners v. London & India Docks etc.* [1892] 3 Ch. 242: that plaintiffs were not liable (immune) to bear certain unlawful charges assessed upon certain docks they might wish to use.

<sup>402</sup> *Marconi's Wireless Telegraph Co. v. Rex* (C. A.) [1918] 1 K. B. 193.

<sup>403</sup> *Burghes v. Atty.-Gen.* [1911] 2 Ch. 139, 155; (C. A.) [1912] 1 Ch. 173.

<sup>404</sup> *China Mutual Steam Navigation Co. v. MacLay* [1918] 1 K. B. 33.

<sup>405</sup> *Toronto Ry. Co. v. City of Toronto* (1906) 13 Ont. L. Rep. 532: although it was not granted, because there was another way of testing the question.

<sup>406</sup> *The Silver Peak Mines, Ltd. v. Williams* (1917, N. S. W.) 17 St. R. 1.

<sup>407</sup> *Elsdon v. Hampstead Corp.* [1905] 2 Ch. 633; *British Fisheries Soc. v. Magistrates of Wick* (1872, Scot.) 10 M. 426. See also *Atty.-Gen. v. Merthyr Tydfil Union* (C. A.) [1900] 1 Ch. 516.

<sup>408</sup> *Atty.-Gen. v. Council of the Municip. of Canterbury* (1917, N. S. W.) 17 St. Rep. 45.

<sup>409</sup> *Williams v. North's Navigation Collieries* (H. L.) [1906] A. C. 136.

<sup>410</sup> *Gateshead Guardians v. Durham C. C.* (C. A.) [1918] 1 Ch. 146; see also *Ellis v. Duke of Bedford* (C. A.) [1899] 1 Ch. 499: no power of the Duke to exclude hucksters from certain market stands.

<sup>411</sup> *Frackelton v. Macqueen* (1909, Queensland) S. C. 89.

<sup>412</sup> *Pacific Coast Coal Mines, Ltd. v. Arbuthnot* (P. C.) [1917] A. C. 607.

<sup>413</sup> *London Asso. of Shipowners v. London & India Docks Committee* [1892] 3 Ch. 242.

exclude the plaintiff from membership.<sup>414</sup> In the absence of any written instrument by which the court can judge the validity or propriety of the acts of those bound by the instrument, declarations of disability have been asked against persons who assumed to exercise powers which did or might injure the plaintiff. Thus, we have seen that reversioners and remaindermen may ask declarations of disability against life-tenants who seek to exercise powers of alienation, etc., which would impair their interests.<sup>415</sup>

#### EFFECT OF DECLARATORY JUDGMENT

Declaratory judgments operate as *res judicata*<sup>416</sup> and bind the parties and their privies within the same limitations as attach to other final judgments. Their force as judgments *in rem* in cases of status and title to property is fortified by the power of the court, in England, at least, to bring before it any person who may be interested in the matter in issue. They cannot, of course, be executed, a feature which constitutes their principal difference from executory judgments. In the case of those judgments which declare a duty, a new action must be founded on them to convert them into judgments on which execution can issue. But this point is more academic than practical, for it rarely proves necessary to resort to this measure; and in fact, when some executory relief is desired in England, the demand for it is generally incorporated with the request for the declaration. Often, indeed, the negative form of declaratory judgment of privilege or immunity cannot be followed by any form of coercive relief at all, the mere declaration that the defendant has no claim against the plaintiff satisfying all the plaintiff's requirements. Should the defendant, nevertheless, subsequently bring an action, he would be met by the plea of *res judicata*. The old judgment can only be reopened or impeached in the same manner and under the same conditions as any final executory judgment.

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<sup>414</sup> This declaration was asked, but not granted. *Cassell v. Inglis* [1916] 2 Ch. 211; *Weinberger v. Inglis* (1917, Ch.) 118 L. T. 208.

<sup>415</sup> *Supra*, p. 120, and illustrations (d), (e) and (f) of sec. 42 of the Indian Specific Relief Act. See also (1905) 61 R G, 18, 19: declaration that defendant owners of a certain trademark had no power to request plaintiffs to withdraw their trademark from the market, the point at issue.

<sup>416</sup> There have been exceptions to this rule: e.g., a decree given *ex parte* declaring the plaintiff of sound mind was not regarded as *res judicata* to found an action for damages against the keepers of an insane asylum who had detained the plaintiff as insane, *Mackintosh v. Smith and Lowe* (1864, Scot.) 2 M. 389. So a judgment where defendants had not appeared was not regarded as *res judicata*: *Hair v. Town of Meaford* (1914) 31 Ont. L. Rep. 124. See also (1910) 74 R G, 122.

## CONCLUSION

The above survey of the many classes of cases for the solution of which the declaratory judgment has proved an effective instrument will have demonstrated that the courts have not exhausted their usefulness by the employment of their curative functions, but that there remains a large field for the application of their preventive functions which in this country has barely been touched. It will have become evident that the social equilibrium, for whose maintenance law and the courts as institutions exist, is disturbed and impaired by the uncertainty and insecurity of legal relations as well as by their attack and violation. That it is the duty of the state to afford the community and its members protection against this uncertainty and insecurity is also self-evident. Indeed, many of our states have already recognized this fact by furnishing simple methods for the determination of such questions as adverse and doubtful claims of title to property and the construction of wills. The adoption of the declaratory judgment would not, therefore, be an innovation but an extension of a practice which, unconsciously perhaps, has been accepted in isolated instances as a useful aid in judicial machinery. Doubt or hesitation concerning the advisability of fully adopting this important instrument of judicial procedure should vanish before the evidence of its undoubted practical value afforded by the experience of England and of a great part of the civilized world. Its simplicity, its capacity to serve important ends of corrective justice without legal hostilities, its utility in deciding many questions which cannot now be brought to judicial cognizance, its efficacy in removing uncertainty from legal relations before they have ripened into a cause of action—that is, its usefulness as an instrument of preventive justice, a field which has hardly begun to be cultivated in this country, commend the declaratory judgment to the earnest attention of the American bar and of the public which it serves. We might with profit study Order XXV, rule 5, of the rules of the English Supreme Court. While in this country the adoption of such a measure would require legislative enactment rather than the simple English promulgation of a rule of court, the need for the declaratory judgment might be met by our states by the incorporation of an amendment in practice acts or codes of procedure in the sense of the following:

“The [trial] court shall have power in any action or in an independent or interlocutory proceeding, to declare rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed; and such declaration shall have the force of a final judgment.”